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REPORTS OF CASES

DECIDED IN THE

SUPREME COURT

OF THE

STATE OF OREGON

FRANK A. TURNER
REPORTER

VOLUME 84

DECISIONS BETWEEN APRIL 17, 1917, AND JULY 3, 1917

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BANCROFT-WHITNEY COMPANY
1917

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OF THE

SUPREME COURT.

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HENRY J. BEAN.....Associate Justice
GEORGE H. BURNETT.....Associate Justice
HENRY L. BENSON.....Associate Justice
LAWRENCE T. HARRIS.....Associate Justice
WALLACE McCAMANT .....Associate Justice
FRANK A. MOORE.....Associate Justice
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DEPARTMENT NO. 1.

JUSTICE HENRY L. BENSON, Presiding Judge.
JUSTICE GEORGE H. BURNETT.
JUSTICE LAWRENCE T. HARRIS.

DEPARTMENT NO. 2.

JUSTICE HENRY J. BEAN, Presiding Judge.
JUSTICE FRANK A. MOORE.
JUSTICE WALLACE MCCAMANT.

THOMAS A. MCBRIDE, Chief Justice.

The Chief Justice, when present, will preside in both departments; in his absence the presiding judge. The Chief Justice at any time may change a justice from one department to the other.

By order of the Chief Justice, a case may be heard by the court sitting *in banc*, either before or after argument. In any case heard before a department, three justices must concur to render a valid judgment.

JUDICIAL DISTRICTS AND CIRCUIT JUDGES

IN THE

STATE OF OREGON

July 3, 1917.

First Judicial District—

Jackson, Josephine — FRANK M. CALKINS, Medford.

Second Judicial District—

Benton, Douglas — JAMES W. HAMILTON, Roseburg.

Curry, Coos — JOHN S. COKE, Marshfield.

Lane, Lincoln — GEORGE F. SKIPWORTH, Eugene.

Third Judicial District—

Linn — PERCY R. KELLY, Department No. 1, Albany.

Marion — GEORGE G. BINGHAM, Department No. 2, Salem.

Fourth Judicial District—

Multnomah —
- JOHN P. KAVANAUGH, Department No. 1, Portland.
- ROBERT G. MORROW, Department No. 2, Portland.
- ROBERT TUCKER, Department No. 3, Portland.
- GEORGE N. DAVIS, Department No. 4, Portland.
- WILLIAM N. GATENS, Department No. 5, Portland.
- CALVIN U. GANTENBEIN, Department No. 6, Portland.

Fifth Judicial District—

Clackamas — JAMES U. CAMPBELL, Oregon City.

Sixth Judicial District—

Morrow, Umatilla — GILBERT W. PHELPS, Pendleton.

Seventh Judicial District—

Hood River, Wasco — FRED W. WILSON, The Dalles. Appointed June 23 1917, to succeed William L. Bradshaw, Deceased.

Eighth Judicial District—

Baker — GUSTAV ANDERSON, Baker.

Ninth Judicial District—

Grant, Harney, Malheur — DALTON BIGGS, Ontario.

Tenth Judicial District—
Union, Wallowa — JOHN W. KNOWLES, La Grande.

Eleventh Judicial District—
Gilliam, Sherman, Wheeler — DAVID R. PARKER, Condon.

Twelfth Judicial District—
Polk, Yamhill — HARRY H. BELT, Dallas.

Thirteenth Judicial District—
Klamath — DELMON V. KUYKENDALL, Klamath Falls.

Fourteenth Judicial District—
Lake — L. F. CONN, Lakeview.

Eighteenth Judicial District—
Crook, Deschutes, Jefferson — T. E. J. DUFFEY, Prineville.

Nineteenth Judicial District—
Tillamook, Washington — GEORGE R. BAGLEY, Hillsboro.

Twentieth Judicial District—
Clatsop, Columbia — JAMES A. EAKIN, Astoria.

DISTRICT ATTORNEYS

IN THE

STATE OF OREGON

July 3, 1917.

County.	Name.	Official Address.
Baker	Levens, W. S.	Baker
Benton	Clarke, Arthur	Corvallis
Clackamas	Hedges, Gilbert L.	Oregon City
Clatsop	Erickson, J. O.	Astoria
Columbia	Metsker, Glen R.	St. Helens
Coos	Hall, John F.	Marshfield
Crook	Wirtz, Willard H.	Prineville
Curry	Buffington, Collier H.	Gold Beach
Deschutes	DeArmond, H. H.	Bend
Douglas	Neuner, George, Jr.	Roseburg
Gilliam	Weinke, T. A.	Condon
Grant	Ashford, Phil	Canyon City
Harney	Biggs, M. A.	Burns
Hood River	Derby, A. J.	Hood River
Jackson	Roberts, G. M.	Medford
Jefferson	Boylan, Bert C.	Metolius
Josephine	Miller, W. T.	Grants Pass
Klamath	Duncan, William M.	Klamath Falls
Lake	McKinney, T. S.	Silver Lake
Lane	Ray, L. L.	Eugene
Lincoln	Hawkins, Calvin E.	Toledo
Linn	Hill, Gale S.	Albany
Malheur	Swagler, R. W.	Malheur
Marion	Gehlhar, Max	Salem
Morrow	Notson, Samuel E.	Heppner
Multnomah	Evans, Walter H.	Portland
Polk	Piasecki, E. K.	Dallas
Sherman	Huddleston, C. M.	Wasco
Tillamook	Goyne, T. H.	Tillamook
Umatilla	Keator, R. I.	Pendleton
Union	Hodgin, John S.	La Grande
Wallowa	Fairchild, Abijah	Enterprise
Wasco	Galloway, Francis V.	The Dalles
Washington	Tongue, E. B.	Hillsboro
Wheeler	Starr, J. K.	Fossil
Yamhill	Conner, Roswell L.	McMinnville

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ERRATUM.

Page 150, line 6 from top, the name "Nichols" should be "Nicholas."

CASES DECIDED

IN THE

SUPREME COURT

OF

OREGON.

Argued March 8, modified and judgment entered March 20, 1917.
On petition for rehearing further modified and cause remanded for new trial, April 17, 1917.

CLIFFORD *v.* SMITH MEAT CO.*

(163 Pac. 808.)

Landlord and Tenant—Rent—Holding Over.

1. Where a lessee held over after expiration of a five year lease, he was liable for rent as a tenant from year to year, in absence of proof that such holding over was merely pending negotiations for readjustment of the rent.

[As to when tenant is guilty of holding over, see note in 70 **Am. St. Rep.** 533.]

ON PETITION FOR REHEARING.

Appeal and Error—Findings—Remanding Cause for New Trial.

2. Where some of the findings made by the Circuit Court were indefinite and a failure to make any findings on other issues involved will preclude the appellate court from entering a judgment, the cause will be remanded for a new trial.

From Multnomah: HENRY E. MCGINN, Judge.

H. H. Clifford brought an action against the Frank L. Smith Meat Company, a corporation, for rent.

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*Authorities discussing the question as to whether each holding over by tenant after expiration of a term of years constitutes a new and separate term, distinct from that which preceded or followed, will be found in a note in 25 **L. R. A. (N. S.)** 847.

On the question of holding over after expiration of lease with option for extension or renewal, without formally exercising option, see notes in 29 **L. R. A. (N. S.)** 174; **L. R. A.** 1916E, 1232.

REPORTER.

There was a judgment for plaintiff, and being dissatisfied with the amount awarded, he appeals. Judgment entered for plaintiff for an increased amount.

Department 2. Statement by MR. CHIEF JUSTICE MCBRIDE.

This was an action to recover rent. The complaint alleged that plaintiff's grantor on April 28, 1908, leased to the defendant two storerooms in the City of Portland for the term of 5 years at an annual rental of $150 per month, and that plaintiff purchased the premises December 1, 1911; that the lease expired on April 29, 1913, but that defendant wrongfully and unlawfully held over until September 1, 1913; that plaintiff had the option to eject the defendant from said premises or to acquiesce in its retaining the same and to accept it as a lessee for one year from the expiration of said lease on the same terms and conditions as set forth in the lease and at the same rental; that he exercised his option and elected to permit the defendant to hold over; that on September 1st it wrongfully quit and abandoned the same; that thereupon plaintiff for the protection and care of said premises resumed possession of the same for the period of eight months of defendant's unexpired term, and let the same to others for the sum of $400, being the highest rent obtainable therefor, all for the use and benefit of defendant. Plaintiff prayed judgment for $1,400. Defendant answered admitting the existence of the lease for five years and denying that it wrongfully held over, that plaintiff had an option either to reject it or accept it as tenant by the year, that plaintiff exercised such option by treating it as such tenant, or that it wrongfully quit said building. It then set up

the five years' lease in full, which contained the following provision:

"At the expiration of said term the said lessee may renew this lease for five years longer at such rental as said lessor would be willing to rent the same for to any other parties, and said lessor shall give lessee the first opportunity to renew this lease at such rental."

And alleged that at the expiration of said five years' term defendant endeavored to induce plaintiff to rent said premises on such reasonable terms as plaintiff could lease it to other persons; that from about the year 1912, to the present time, the values of property and of the rentals thereof in the City of Portland, and more especially in the vicinity of the property described in the lease, greatly depreciated, and notwithstanding such condition the plaintiff refused to rent the property to this defendant for the rental which he was willing to rent to other persons and to renew the lease in accordance with said option, but demanded of defendant the sum of $150 a month for said premises for an additional five year term, and that defendant should execute and deliver to him a lease therefor, which is made a part of the answer; that the defendant notified him it would not accept the proposed lease because of the change in terms, and that it would not pay the rent demanded for the reason that said premises were not worth said sum and for the further reason that he was willing to rent the property to other persons at a lower rent than that demanded of it; that it could not from the business conducted on said premises pay the rent demanded without operating at a loss, and so informed plaintiff, again requesting him to reduce the amount thereof to that sum for which plaintiff would be willing to rent the premises to other persons, but that he refused to do so; that de-

fendant, by the wrongful acts of plaintiff, and by the breach of the contract contained in the lease, was compelled to surrender the premises; that the plaintiff thereupon leased them to other persons, who engaged in the retail meat and packing business and used the fixtures placed there by defendant, and plaintiff asked from them and received $50 a month for the period of three years for one portion thereof, the other portion although remaining vacant for one year, being subsequently rented for $25 a month; that the plaintiff in so doing without notice to defendant, or affording it an opportunity to exercise its option, violated its contract. Defendant pleaded a tender of $50 a month for the time occupied and a counterclaim for damages for plaintiff's refusal to lease the premises at a reduced rent. The reply denied the new matter set up in the answer, and thereupon there was a trial before the court without a jury, resulting in findings of fact in regard to the existence of the five years' lease and the ownership of the property and conclusions of law as follows:

"Third. At the expiration of said lease, to wit, May 1, 1913, the defendant failed to exercise its option to renew said lease, then or thereafter, but remained in the use, possession, and occupation of said premises until the first day of September, 1913, when it abandoned the same. Fourth. That thereupon, for the protection, care, and betterment of said premises, plaintiff entered thereon and resumed possession of the same and leased a portion of same to one Carlin for the sum of $50 per month during the period from said first day of September, 1913, to May 1, 1914, and plaintiff received as rental therefor the sum of $400, and no more. Fifth. That at the time of the expiration of the said lease, and immediately prior thereto, the plaintiff had a *bona fide* offer from the Union Meat Company, a responsible corporation, of $150 per month

rental for said premises. Sixth. That the plaintiff was not willing to accept any less sum than $150 per month as rental for said premises and the defendant was not willing to pay said sum as rental for the same. Seventh. That the plaintiff was unable to rent the remainder of said premises during the period from May 1, 1913, to May 1, 1914, but subsequent to that time he rented the remainder of said premises for $25 per month. Eighth. That on May 1, 1913, the reasonable rental value of said premises was the sum of $75 per month. And as conclusions of law the plaintiff is entitled to a judgment against the defendant for the sum of $300 and for the costs and disbursements of this action."

The plaintiff moved to substitute for the conclusions of law above recited the following:

"The plaintiff is entitled to a judgment against the defendant for the sum of $1,400 and for the costs and disbursements of this action."

This motion was overruled, and the court rendered judgment for plaintiff for $300, from which he appeals, alleging as error the refusal of the court to adopt the conclusion of law submitted and to enter judgment in his favor for the sum of $1,400.

MODIFIED. JUDGMENT ENTERED.

For appellant there was a brief over the names of *Messrs. Huston & Huston* and *Mr. Claude McColloch,* with an oral argument by *Mr. Samuel B. Huston.*

For respondent there was a brief over the names of *Mr. John J. Fitzgerald* and *Messrs Logan & Smith,* with an oral argument by *Mr. Fitzgerald.*

Opinion by MR. CHIEF JUSTICE MCBRIDE.

This appeal is from the findings and judgment; the testimony not having been incorporated in the bill of

exceptions or brought up by any method. The findings are very meager, but as both parties were satisfied with them, and no additional findings were requested, we have only to determine what judgment should have been rendered upon the facts found. Briefly stated they amount to this: The defendant had a five years' lease upon the property at a monthly rental of $150, with a privilege of renewal for five years more at such rental as the lessor would be willing to take from other parties, defendant to have the preference over other parties proposing to lease the property. Another finding is to the effect that at the expiration of defendant's lease and immediately prior thereto plaintiff had a *bona fide* offer of $150 per month for a lease of the property, but the finding does not intimate whether this offer was for a five years' lease, for a less period, or for a single month. The sixth finding is to the effect that at the expiration of the lease the defendant was unwilling to renew at the rental of $150 a month and the plaintiff was not disposed to take less; and by the third finding we are informed that the defendant failed to exercise its option to renew, but remained in possession and occupation of the premises until September 1, 1913, when it abandoned them. There is no finding that during the occupancy any negotiations were pending or any treaty in prospect between plaintiff and defendant. We have only the bare fact that at the expiration of the original lease the plaintiff, with a *bona fide* offer of $150 a month rental from another party, did not wish to take less from defendant, and that defendant was unwilling to pay that sum, and continued to hold over. It is well-settled law that a tenant for years holding over after the expiration of his lease will be deemed a tenant for another year in the absence of some agreement with his landlord to the contrary. In

Tiffany on Landlord and Tenant, Vol. 2, Section 206, the law is thus stated:

"It is the duty of a tenant for years, unless he obtains a renewal of the lease, to relinquish the possession of the premises at the end of the term, and his failure so to do is not excused by the fact that the landlord has not demanded the possession or manifested a readiness to receive it. In one state only, it appears, has a different view been asserted, it being there said that the tenant is under an obligation not to leave unoccupied a dwelling leased to him. The duty to relinquish possession applies to the whole premises, and if the tenant fails to relinquish any part, he is regarded as 'holding over' as to all. The tenant has no right to retain possession for the sake of cleaning the premises, nor, it seems, for the sake of removing improvements in accordance with a stipulation giving him such right of removal. But not infrequently he is allowed, by the express provisions of the lease, to retain possession until the landlord has paid him for improvements made by him. And occasionally a provision looking towards the possible purchase of the premises by the tenant may have the effect of enabling the latter to retain possession pending the settlement of the price to be paid. The fact that the instrument of lease provides that rent shall be paid by the lessee in case he holds over does not give him any right to hold over. Nor can the tenant justify his failure to relinquish possession by showing that he had permission to remain from an intending lessee of the reversion, the negotiations between whom and the landlord, however, did not result in the making of a lease. It has been decided that, when the day of the termination of the tenancy falls on Sunday, the tenant need not relinquish possession until the next day, applying the rule which is ordinarily adopted that, if one has a certain period in which to do a thing, and the last day of the period is Sunday, he has until the next day for performance. In three states the statute provides that if, in the case of agricultural land, the tenant holds over sixty days without any demand for possession being made upon

him, he may hold for another year, as by permission of the landlord. In another state there is a somewhat similar provision that if proceedings to expel the tenant are not brought within a time named, he may hold over for another term of a period named in the statute."

See also Jones on Landlord and Tenant, §§ 201, 205, and 206. The following authorities cover every phase of this subject: *Morgan* v. *Harrison,* 2 Ch. (1907) 137; *Re Canada Coal Co.,* 27 Ont. 151; *Isaacs* v. *Furgeson,* 26 N. B. 1; *Singer Mfg. Co.* v. *Sayre,* 75 Ala. 270; *Belding* v. *Texas Produce Co.,* 61 Ark. 377 (33 S. W. 421); *Zippar* v. *Reppy,* 15 Colo. 260 (25 Pac. 164); *Ridgeway* v. *Hannum,* 29 Ind. App. 124 (64 N. E. 44); *Dimock* v. *Van Bergen,* 94 Mass. (12 Allen) 551; *Weston* v. *Weston,* 102 Mass. 514; *Gardner* v. *Board of Dakota County Commissioners,* 21 Minn. 33; *Coatsworth* v. *Ray,* 52 N. Y. Supp. 498; *Baylies* v. *Ingram,* 84 App. Div. 360 (82 N. Y. Supp. 891, 181 N. Y. 518, 73 N. E. 1119); *Moore* v. *Harter,* 67 Ohio St. 250 (65 N. E. 883); *Wilson* v. *Alexander,* 115 Tenn. 125 (88 S. W. 935); *Amsden* v. *Atwood,* 69 Vt. 527 (38 Atl. 263). Where the holding over is pending negotiations for a new lease, it will not be deemed from year to year, but the other terms of the lease will apply so far as applicable to the situation, including rental at the rate provided in the original lease. To this effect see *Morgan* v. *Harrison, supra; Re Canada Coal Company, supra; Singer Mfg. Co.* v. *Sayre, supra.* This seems a fair and reasonable doctrine, but is not applicable here for the reason that there is no finding that any negotiations were pending during the period between the expiration of the lease and the abandonment of the premises by defendant. It should be remarked that the difference between the parties as indicated by the pleadings was not as to a monthly or yearly tenancy of the

property, but as to the compensation to be paid for a renewal for five years. For aught that appears in the pleadings the defendant might have been willing to pay $150 a month for a lease for a single year, while the plaintiff might have been disinclined to take chances that rents might so augment within a period of five years that a lesser rental for so long a period might in the aggregate turn out to be less than the real rental value of the property for the entire period. So that the fact that the plaintiff had a *bona fide* offer of $150 a month rental for a year or a month, and the fact that at the particular time the old lease expired the reasonable rental value of the property was less than that, is of little importance. The facts as deduced from the findings still remain that at the expiration of the old lease the parties could not agree on the terms of a renewal, and the defendant without any arrangement as to time or terms continued to hold over.

Under these circumstances we think the defendant became tenant from year to year, and that plaintiff was entitled to the conclusion of law requested and to judgment upon the findings for the sum of $1,400; and a judgment will be here entered accordingly.

MODIFIED. JUDGMENT ENTERED.

MR. JUSTICE MOORE, MR. JUSTICE BEAN and MR. JUSTICE MCCAMANT concur.

Former opinion modified and cause remanded for new trial April 17, 1917.

ON PETITION FOR REHEARING.

(163 Pac. 810.)

On petition for rehearing the former opinion rendered herein is modified to the extent that the cause is remanded to the Circuit Court for a new trial.

MODIFIED AND REMANDED.

Mr. John J. Fitzgerald and *Messrs. Logan & Smith,* for the petition.

Messrs. Huston & Huston and *Mr. Claude McColloch, contra.*

Department 2. Opinion PER CURIAM.

Upon a careful review of our former decision we are of the opinion that taking into consideration the indefiniteness of some of the findings made by the court below and its failure to find on the issue presented as to whether the negotiations for a new lease were pending between the parties during the time the premises were occupied by defendant after the expiration of the original lease, we have not data sufficient to render a judgment here, and that justice will be subserved by remanding the cause for a new trial in accordance with the law as enunciated in the original opinion.

In regard to the disposition of the case here the opinion is modified. In all other respects it will stand.

FORMER OPINION MODIFIED AND REMANDED.

Argued March 14, affirmed March 27, rehearing denied April 17, 1917.

TODD *v.* CORMIER, MAYOR.

(163 Pac. 974.)

Municipal Corporations — Disbursement of Funds — Warrants — Necessity of Mayor's Signature.

1. Where a city charter authorized the recorder to draw a warrant on the treasurer for the amount ordered paid, and directed the treasurer to pay out moneys on warrants signed by the recorder, the mayor's signature was not necessary to the validity of such a warrant although a prior ordinance had required his signature and the charter provided that ordinances then existing and not inconsistent with it should be continued.

Municipal Corporations—Employment of Attorneys—Compensation—Ordinances—Construction—"Extraordinary Services."

2. Where an ordinance authorized employment of an attorney at an annual salary of three hundred dollars, "in full for all general services rendered by him as counsel for city officers, and prosecuting all cases in city courts," but provided that the council may allow him such other sums as reasonable for extraordinary services, litigation in state or other outside courts, and necessary business trips outside the city, the words "extraordinary services" include extra services in preparing bonds for the city.

From Linn: WILLIAM GALLOWAY, Judge.

Department 1. Statement by MR. JUSTICE HARRIS.

The plaintiff Alfred Todd appealed from a judgment quashing an alternative writ of *mandamus* which directed the defendant Dennis Cormier as mayor of the City of Lebanon either to sign a warrant for $75 on the city treasurer or to show cause for not signing it. Alfred Todd, who was city attorney, rendered legal services to the City of Lebanon in connection with the issuance of $10,000 of street improvement bonds and $42,000 of refunding bonds; and he also advised and assisted in the preparation of certain necessary transcripts of the proceedings authorizing the bonds. In April, 1915, the plaintiff presented a bill to the city council containing a charge of $25 for "extra services"

rendered in the issuance of the street improvement bonds and another item of $50 for "extra services in refunding bond matter." The bill was allowed by the council and the recorder then drew, signed and delivered to the plaintiff, a warrant on the city treasurer for the sum of $75 payable to the order of Alfred Todd. The plaintiff then presented the warrant to the defendant and requested that he sign it as mayor, but the latter refused to do so, and this proceeding was then commenced for the purpose of compelling the defendant to sign the warrant.

The answer to the writ contains two defenses: (1) That the mayor is not required to sign warrants on the city treasurer; and (2) that the warrant was illegal for the reason that the annual salary paid to the city attorney was full payment for the services rendered by the plaintiff and the council was without authority to allow any compensation in addition to the amount of the annual salary.

AFFIRMED. REHEARING DENIED.

For appellant there was a brief and an oral argument by *Mr. Dan Johnston.*

For respondent there was a brief and an oral argument by *Mr. N. M. Newport.*

MR. JUSTICE HARRIS delivered the opinion of the court.

1. The plaintiff is attempting to compel the defendant to sign the warrant on the theory that the signature of the mayor is essential to give it validity. If, however, it is not necessary for the mayor to sign city warrants and if the city treasurer is authorized to accept and pay warrants which are signed by the recorder

only, then the plaintiff is not entitled to a peremptory writ. The plaintiff argues that an ordinance passed in 1891 requires the mayor to sign warrants on the treasurer, while the defendant contends that the charter adopted by the legal voters in 1913 contemplates that none but the recorder shall sign warrants.

The ordinance of 1891 declares that the treasurer "shall pay no funds out of the city treasury except on orders drawn by the city recorder therefor, under the order of the council, signed by the mayor and recorder."

The pleadings admit the adoption of the 1913 charter and the copy received in evidence was admitted by both parties to be "the charter under which the city of Lebanon is now acting and was at all times mentioned in the petition and writ." An examination of the charter will make it clear that the mayor need not countersign warrants on the city treasurer. When the council orders an account or demand to be paid the recorder must by the terms of Section 150 of the charter "draw a warrant on the treasurer for the amount ordered paid"; and Section 154 directs the treasurer to pay out moneys "upon warrants signed by the recorder." Nowhere does the charter contain any provision making it the duty of the mayor to sign warrants. It is true that by Section 55 all ordinances existing at the time of the adoption of the charter and not inconsistent with it are preserved and continued, and that in addition to the duties expressly imposed by the charter, the mayor shall, under the terms of Section 137, "perform such other duties * * as may be prescribed by * * any city ordinance not inconsistent" with the charter.

Turning again to Section 154 the charter directs the treasurer to pay out moneys "upon warrants signed

by the recorder." The language used in Section 154 is only one way of saying that the warrant need not be signed by any other officer. Naming the recorder and omitting all others amounts to a statement that no officer except the recorder need sign a warrant and therefore any ordinance that requires the mayor to do what the charter says need not be done is inconsistent with the charter. In effect, the charter says that the mayor is not required to sign warrants; in effect, the ordinance of 1891 requires the mayor to sign all warrants, because the treasurer is prohibited from paying any warrant unless it is signed by both the mayor and recorder; and consequently the ordinance of 1891 is inconsistent with the charter of 1913 and the former must succumb to the latter. The mayor is not required to countersign warrants on the treasurer.

2. While it is not necessary to a decision of the instant case nevertheless we offer the suggestion that the defendant is placing an exceedingly narrow construction on the ordinance of 1915 which fixes $300 as the annual salary of the city attorney and declares that this amount shall be

"in full for all general services rendered by him to the city as counsel for the city officers, and prosecuting all cases in the city courts; provided, however, that the council may allow such other sums as shall be reasonable for extraordinary services, litigation in state or other outside courts, and necessary business trips outside the city."

The contention of the defendant is that the words "extraordinary services" do not include anything more than "litigation in state or other outside courts, and necessary business trips outside the city." Viewing the section in its entirety and giving effect to all the words found in the section would indicate that the

ordinance contemplates that the words "extraordinary services" are not confined and limited to "litigation in state or other outside courts and necessary business trips outside the city." If the contention of the defendant is correct then it was an inexcusable waste of language to employ the words "extraordinary services." One of the accepted canons of construction requires that some meaning, if possible, be given to all the words of an ordinance.

The plaintiff is not entitled to a writ commanding the mayor to sign the warrant held by the plaintiff and the judgment is therefore affirmed.

AFFIRMED. REHEARING DENIED.

MR. CHIEF JUSTICE MCBRIDE, MR. JUSTICE BENSON and MR. JUSTICE BURNETT concur.

Argued February 20, affirmed March 13, opinion modified on rehearing April 17, 1917.

ROSENWALD *v.* OREGON CITY TRANSP. CO.

(163 Pac. 831; 164 Pac. 189.)

Shipping—Loss of Goods by Carrier—Trial—Election Between Defenses.

1. In action against a carrier by water for loss of goods, refusal to require defendant's election between defenses that damage was caused by negligence of colliding dredge and by dangers of navigation, etc., is not erroneous, where motion was made after jury had been impaneled.

Shipping—Liability of Carrier—Limitation—Dangers of Navigation and Unavoidable Accident.

2. A carrier by water may, by contract, exempt itself from liability for loss occurring from "dangers of navigation" or "unavoidable accident."

Shipping—Liability of Carrier—Limitation—Construction—"Act of God."

3. Provisions in a carrier's contract, exempting it from loss to goods due to "dangers of navigation" and "unavoidable accident,"

are broader than term "act of God," and excuse it where a collision occurred without its fault.

Shipping—Carriers—Loss of Goods—Jury Question.

4. Where a carrier's contract exempted it from loss due to "dangers of navigation" and "unavoidable accident," it is a jury question whether the loss so occurred without negligence on the carrier's part.

Shipping—Carriers—Loss of Goods—Burden of Proof.

5. A defendant carrier by water whose contract exempted it from loss due to dangers of navigation or unavoidable accident has the burden of showing the loss so occurred without negligence on its part.

Shipping—Carriers—Loss of Goods—Admissibility of Evidence.

6. Where defendant carrier claimed goods intrusted to it were lost by dangers of navigation or unavoidable accident, evidence regarding a recent change in the position of a dredge it collided with and an unexpected rise in the river, was admissible.

Shipping—Carriers—Loss of Goods—Instructions.

7. In action against a carrier by water for loss of goods, requested instructions that defendant was not excused if loss was caused by certain water conditions were properly refused because not including defense based upon negligence of a colliding dredge.

Shipping—Carriers—Loss of Goods—Instructions.

8. In action against a carrier by water for loss of goods, an instruction that defendant was not liable for loss caused by an unexpected rise in the river, etc., is erroneous, where there was no evidence to support such theory.

Appeal and Error—Harmless Error—Instructions.

9. An erroneous instruction that defendant carrier by water was not liable for loss occasioned by sudden change in water conditions is harmless, where plaintiff's failure of proof prevented recovery in any event.

[As to liability of carrier for loss of goods occasioned partly by act of God, and partly by other means, see note in 97 Am. Dec. 409.]

Shipping—Carriers—Loss of Goods—Failure of Proof.

10. Where plaintiff declares upon the common-law liability of defendant common carrier, but the shipment was made under a written contract containing material restrictions upon its liability, there is a failure of proof preventing recovery.

Appeal and Error—Necessity of Decision.

11. It is unnecessary to consider plaintiff's assignment of error concerning a restriction on argument of counsel, where plaintiff's failure of proof prevented recovery in any event.

ON PETITION FOR REHEARING.

Appeal and Error—Determination—Remand for Amendment—Failure of Proof.

12. Sections 97-99, L. O. L., relating to curing variances by amendment, but providing that failure of proof is not a variance,

does not authorize remanding a case with permission to amend, where plaintiff entirely failed to prove his allegations.

Appeal and Error—Modification of Judgment—Failure of Proof.

13. Where plaintiff's failure of proof merited a nonsuit below, a judgment for defendant will be modified to one of nonsuit, although plaintiff resisted a nonsuit motion in the court below.

From Marion: PERCY R. KELLY, Judge.

This is an action by T. Rosenwald, doing business under the trade name and style of T. Rosenwald & Company, against the Oregon City Transportation Company, a corporation. Affirmed.

Department 1. Statement by MR. JUSTICE BURNETT.

The substance of the complaint in this action is that on December 26, 1913, the plaintiff and his assignors delivered to the defendant as a common carrier by water for transportation to Portland, Oregon, sundry bales of hops of a certain value which the latter, in consideration of a reasonable compensation to be paid to it by the plaintiff, agreed to carry to its destination and there deliver to him on or before the next day but one following, but that during the voyage the steamer carrying the hops sank in the Willamette River whereby the property was injured to his damage in an alleged sum. His cause of action and that of his assignors are separately stated but in substantially the same language except as to the averment of assignment. It is convenient and sufficient therefore to consider but one of them as the defense to each is the same.

Answering, the defendant admits its ownership and operation of a river steamer called "The Oregona" and the identity of plaintiff and defendant, but denies all the other allegations of the complaint. It avers that on December 26, 1913, it entered into a contract

in writing with the plaintiff whereby it undertook as a common carrier to transport from Mission Landing on the Willamette River to Portland, Oregon, subject to all the terms and conditions of the contract certain hops which shipment is the same transaction mentioned in plaintiff's complaint. A copy of the agreement is set out as an exhibit of which it is sufficient to state that it contains this language:

"Received in good order on board the steamer Oregona for —— the following packages to be delivered in good order, the dangers of navigation, fire, leakage, rats and other unavoidable causes excepted, and subject while in possession of said Oregon City Transportation Co. or its connecting lines, to all stipulations entered in bill of lading; and further subject to the conditions endorsed on back hereof, to all of which the shipper hereby assents.

"(Signed) T. ROSENWALD & Co., Shipper"

Then follows a description of the hops by lot numbers and weights and the receipt is signed by the defendant. The answer also contains the following averments:

"That defendant undertook to transport said shipment of hops to Portland, Oregon, and while said steamer Oregona was being properly and carefully operated in a careful and proper way and manner and without any negligence or carelessness whatsoever upon the part of the defendants said steamer at about six o'clock P. M. on said date, at Magoon Bar, at the foot of the Clackamas Rapids in the Willamette river the aft part of the port side of said steamer collided with and struck the corner of the United States dredge Champoeg, from the result of which said steamer foundered and sank.

"That the said Willamette river from Portland to Corvallis and particularly at the place of said accident is a navigable stream and as such is under the sole and exclusive control of the United States government;

that said government, prior to said accident, had by appropriations and setting aside moneys for the improvement of said river, maintained dredges, snag boats and done and performed other public work upon said river, one of which said dredges was the United States dredge Champoeg, which said dredge at the time of the accident mentioned herein was under the supervision and control of the United States, and was engaged in doing dredging on said Magoon Bar.

"That on the 24th and 25th day of December, 1913, at the time said steamer Oregona passed said dredge going up the river said dredge was being operated about 500 feet north of the place of said accident and subsequent to, and prior to said accident, said United States dredge was by the authority of the proper United States officers, moved from said point to the foot of the Clackamas Rapids, and without any notice whatsoever to said steamer Oregona, began dredging at said place, and owing to the swiftness of the current of the river at said place, stretched a wire cable from said dredge across the channel to the east side of the river and without notice or warning to said steamer Oregona and while said steamer was being operated as aforesaid; said steamer, after reaching said swift current and approaching said dredge without any warning whatsoever to the officers and agents of defendant and after approaching to and near said cable the officers and agents of defendant discovered the same and realized the imminent danger to the life of the passengers of said steamer, thereupon applied full steam and backed said steamer full speed astern, and applied every precaution known to straighten said boat in said swift current and avoid the accident, but owing to said dredging and the swiftness of said current said boat was thrown against the corner of said dredge, damaged and sunk.

"That if said hops or any part thereof were damaged as alleged in said complaint, said damage, so far as this defendant is concerned, was the proximate cause of the act and authority of the United States government and of the negligence of said govern-

ment's officers and agents as above set forth, and so far as defendant is concerned, an unavoidable accident.

"That one of the conditions of said contract was that said hops were received in good order on said steamer to be delivered in good order at Portland, Oregon, subject to the dangers of navigation and other unavoidable causes; that plaintiff and his agents drew said contract and subscribed the same, and knew prior to said shipment, of said clause; that the dangers of navigation mentioned therein was the danger of navigating said steamer upon and over the rapids, shallows and bars of said river, and principal one of which are and were Clackamas Rapids and Magoon Bar, at which place said accident happened; that said rapids and said bar are dangerous to navigate for the reason that the Clackamas and Willamette rivers unite, and bed of the river falls to such an extent that said current is transformed into a rapid and dangerous stream of water, which runs at a curve of 45° and that in navigating a boat down stream in said current, the swiftness of said water, the swirls and whirlpools thereof make it dangerous and difficult to navigate and control said boat; that the sinking of said boat was approximately caused by the natural action, flow and force of said water and was, thereby, an act of God, and an unavoidable cause so far as defendant was concerned, and happened and occurred without any negligence whatsoever upon the part of defendant, and if any damage was sustained to said hops, said damage and loss, if any, was by said contract excepted from defendant's liability thereunder."

All the new matter in the defendant's pleading except the artificial entity of the parties is traversed by the reply save as alleged in the complaint. The evidence for the defendant substantially supported the affirmative answer. The trial terminated in a verdict for the defendant. From the consequent judgment the plaintiff appeals. AFFIRMED.

For appellant there was a brief over the names of *Mr. Hall S. Lusk, Messrs Dolph, Mallory, Simon & Gearin* and *Messrs. Carson & Brown,* with an oral argument by *Mr. Lusk.*

For respondent there was a brief over the names of *Mr. Abraham Nelson* and *Messrs. Westbrook & Westbrook,* with an oral argument by *Mr. Nelson.*

MR. JUSTICE BURNETT delivered the opinion of the court.

1. As a preliminary it was contended that the answer contained two defenses and it is assigned as error that the court overruled the plaintiff's motion to require the defendant to elect between them, the first of which was to the effect that the damage was occasioned by the negligent conduct of the officers of the United States government in charge of the dredge and the other that the loss was due to the dangers of navigation and the act of God. This motion was not made until the jury had been impaneled and the cause was ready for the testimony. In *Fleishman* v. *Meyer,* 46 Or. 267 (80 Pac. 209), it was held that such an attack should have been made by motion during the formation of the pleadings and it came too late when the issue was ripe for hearing. This case is to be distinguished from *Harvey* v. *Southern Pac. Co.,* 46 Or. 505 (80 Pac. 1061), where at the trial the plaintiff was compelled to elect between two inconsistent causes of action which he based upon the same grievance. A defendant is entitled to urge as many defenses as he may have; while a plaintiff must make "a plain and concise statement of the facts constituting the cause of action without unnecessary repetition": Section 67, L. O. L. The code abolishes all the ancient forms whereby a plaintiff might state his plaint in several different

counts leading to the same result, while a defendant may multiply his defenses within prescribed limits. This serves to differentiate the Fleishman-Meyer Case and the Harvey Case. The assignment of error about refusing to compel the defendant to elect must therefore be laid out of consideration.

In *Wells* v. *Great Northern Ry. Co.*, 59 Or. 165 (114 Pac. 92, 116 Pac. 1070, 34 L. R. A. (N. S.) 818, 63 Am. & Eng. Ry. Cas. (N. S.) 775, 65 Am. & Eng. Ry. Cas. (N. S.) 694), 1 N. C. C. A. 659, 7 N. C. C. A. 979), a railway case, the court laid down the rule that the duty of a common carrier was in the nature of insurance and that he could not escape liability for nonperformance of his stipulation except by showing that his failure was occasioned by the act of God or a public enemy, an act of public authority, an act of the shipper, or the intrinsic nature of the property intrusted to it. For common carriers by water the congressional statute of February 13, 1893, c. 105 (27 Stats. 445; 3 U. S. Comp. Stats. 1913, § 8031), known as the Harter Act, has enlarged the exemption in these words:

"If the owner of any vessel transporting merchandise or property to or from any port in the United States of America shall exercise due diligence to make the said vessel in all respects seaworthy and properly manned, equipped, and supplied, neither the vessel, her owner or owners, agent, or charterers, shall become or be held responsible for damage or loss resulting from faults or errors in navigation or in the management of said vessel nor shall the vessel, her owner or owners, charterers, agent, or master be held liable for losses arising from dangers of the sea or other navigable waters, acts of God, or public enemies, or the inherent defect, quality, or vice of the thing carried, or from insufficiency of package, or seizure under legal process, or for loss resulting from any act or omission of the shipper or owner of the goods, his agent or represent-

ative, or from saving or attempting to save life or property at sea, or from any deviation in rendering such service."

2. It is also well established that a carrier may properly limit its liability so as to exempt it from loss accruing from dangers of navigation or unavoidable accident. It is competent therefore for the carrier to restrict not only its responsibility but also its privileges. It may substitute any lawful contract for the rule imposed upon it by the common law or for the immunity conferred upon it by statute and it is said in *Patterson* v. *Wenatchee Canning Co.*, 59 Wash. 556 (110 Pac. 379), following *Butler* v. *Greene*, 49 Neb. 280 (68 N. W. 496):

"A special contract of bailment prevails against general principles of law applicable in the absence of an express agreement."

This doctrine is likewise followed in the later case of *Alaska Coast Co.* v. *Alaska Barge Co.*, 79 Wash. 216 (140 Pac. 334, L. R. A. 1915C, 423). The decision of the instant case, therefore, must turn mainly upon the construction of the instrument pleaded by the defendant; for it is without dispute in the testimony that the stipulation of the parties was evidenced by the writing set out in the answer.

3. The effort of the plaintiff is to show that the circumstances do not disclose an act of God and that "dangers of navigation" and "unavoidable accident" practically are synonymous with the phrase "act of God." An act of God may be—

"said to be that which is occasioned exclusively by the violence of nature; by that kind of force of the elements which human ability could not have foreseen or prevented, such as lightning, tornado, sudden squall of wind, and the like. Again, it is said to be at least

an act of nature which implies entire exclusion of all human agency, whether of the carrier himself or of third persons. It is called a disaster with which the agency of man has nothing to do. It is defined to be a natural necessity, which could not have been occasioned by the interference of man, but proceeds from physical causes alone": 1 Words & Phrases, p. 118, and authorities there cited.

But this term is more restricted in its signification than either "dangers of navigation" or "unavoidable accident," for it is plain that either of the latter may happen in cases where the actions of human beings operate as an essential part. A casualty occurring by an act of God is an "unavoidable accident" but it is not every unavoidable accident which is an act of God.

In *United States* v. *Kansas City So. R. Co.,* 189 Fed. 471, we find this:

"While some authorities hold that 'unavoidable accident' is synonymous with 'act of God,' the better definition, in the opinion of the court, is that it must be an inevitable accident which could not have been foreseen and prevented by the exercise of that degree of diligence which reasonable men would exercise under like conditions and without any fault attributable to the party sought to be held responsible."

In *Hodgson* v. *Dexter,* 1 Cranch C. C. 109, 12 Fed. Cas. 283, it is said:

"By common acceptation, unavoidable accident means, a casualty which happens when all the means which common prudence suggests have been used to prevent it."

In *Central Line of Boats* v. *Lowe,* 50 Ga. 509, speaking of unavoidable accident, the court said:

"As we understand the words they mean an irresistible cause standing exactly on the footing with an act of God except that it is the product of human agency."

Hays v. *Kennedy*, 3 Grant Cas. 351 (41 Pa. St. 378, 80 Am. Dec. 627), was a case of collision of two steamers on the Ohio River. After discussing the precedents the court concludes with this utterance:

"Whatever may be said, therefore, respecting the meaning of the phrase 'act of God,' we think it can have no application in a case where the parties have expressly provided a different rule of liability, by expressing themselves in terms that cannot reasonably be interpreted in the narrow sense often attributed to that phrase. When they provide that they shall not be liable for the unavoidable dangers of the navigation, they mean dangers that are unavoidable by them, supposing that they have exercised all the precaution, care, and skill that the law usually demands of common carriers. They mean that they shall not be answerable as insurers against accidents which the law respects as inevitable; but that if they prove such an accident falling upon them without any previous fault of theirs, and that they had a proper vessel and crew, and did all in their power to extricate themselves from the danger, they shall be as free from liability as they are from fault."

Treating of the exception "dangers of the river" in *Whitesides* v. *Thurlkill*, 12 Smedes & M. (20 Miss.) 599 (51 Am. Dec. 128), the court ruled that if in a collision with another steamer the damage arose without any fault of the defendant or of the hands upon his boat they were excusable; but if they had been guilty of negligence or might have prevented the loss by the exercise of reasonable skill and diligence the defendant would be liable. It was also held in *Van Horn* v. *Taylor*, 2 La. Ann. 587 (46 Am. Dec. 558 [same case reported as *Van Hern* v. *Taylor*, 7 Rob. (La.) 201, 41 Am. Dec. 279]), that a collision happening without the fault of defendant was an unavoidable accident, and in *The Favorite*, 2 Biss. 502, 8 Fed. Cas. 1103, it was de-

cided that where a vessel struck a hitherto unknown and invisible snag the casualty was due to a danger of the river.

4. From these and other precedents which might be cited we deduce the principle that under exceptions such as are noted in the contract pleaded by the defendant in this case the carrier will be excused from liability on showing that without fault on his part and while doing all he could do seasonably to prevent the accident a collision with another vessel ensued resulting in damage to his cargo. On the other hand, it is said in *Union Steamship Co.* v. *New York & Va. Steamship Co.*, 65 U. S. 307 (16 L. Ed. 699):

"It is not inevitable accident, as was well remarked by the learned judge in the case of the Juliet Erskine, 6 Notes of Cases 634, 'where a master proceeds carelessly on his voyage, and afterwards circumstances arise when it is too late for him to do what is fit and proper to be done.' He must show that he acted seasonably, and that he 'did everything which an experienced mariner could do, adopting ordinary caution,' and that the collision ensued in spite of such exertions."

5–7. Under such conditions it is a question for the jury to determine under all the circumstances disclosed by the evidence whether the defendant brings himself within the doctrine of the precedents cited. As to the care and vigilance of the defendant the situation is analogous to the teaching of *Palmer* v. *Portland Ry. L. & P. Co.*, 56 Or. 262 (108 Pac. 211, 59 Am. & Eng. Ry. Cas. (N. S.) 68), wherein it is held that the question of whether or not a person was negligent is one for the jury under proper instructions from the court. In carrier cases under a contract like the one here involved it is incumbent upon the defendant to show that it was exercising proper diligence under all the circum-

stances and was free from fault in order to avail itself of the stipulated exceptions to the common-law liability. To enable them to judge of this matter the jurors were entitled to know all the circumstances surrounding the transaction and this disposes of the questions to which the plaintiff objected wherein it was sought to show the amount of water going through the Clackamas Rapids and whether it would influence the control of the boat; if there was any notice of the dredge being anchored at the point where the collision occurred and if it had been at the place where she was a day or two before, approximately 700 feet farther downstream, the "Oregona" could have passed safely.

8. The plaintiff complains of the court's refusal to charge the jury that the terms "danger of navigation" and "unavoidable causes" signified accidents which do not happen by the intervention of man. But as we have shown by the precedents this is not an accurate definition of those terms. The court also declined to instruct the jury as follows:

"That under the pleadings in this case the only thing upon which the defendant relies as coming within the exception of the contracts as to dangers of navigation and unavoidable causes, is that the accident was caused by the rapids, shallows, bars, swiftness of the current and whirlpools of the river. If you find from the evidence that the accident was due to these causes, or any of them, your verdict must be for the plaintiff, because such an accident does not come within the said exceptions of the dangers of navigation and other unavoidable causes."

This request to charge is faulty in that it does not state all the pleading, but only part of it. The instruction to be available must cover the whole theory of the case. The same objection is applicable to the other request of the plaintiff to direct the jury—

"that an accident occurring as the result of the rapids and current and bar in the river which condition has existed for a long period of time is not such an accident as is caused by the act of God."

The instructions given by the court substantially embodied both the theory of the plaintiff and that of the defendant except in the part which follows:

"You are instructed that if you find at the time of the accident there had been an unexpected rise in the Willamette river above the Clackamas Rapids and that these two elements combined to cause an unprecedented swift, dangerous and unexpected action and flow of water at said Rapids and Magoon's Bar, and that this said condition could not have been foreseen, prevented nor guarded against by the defendant, or its agents, and was not produced nor contracted by human agency, then in that event it constituted an act of God, and if plaintiff's loss, if any, was occasioned thereby, without negligence on defendant's part, defendant would not be liable, and your verdict must be for the defendant."

This declaration is at least abstract and inapplicable to the issues of the case. It is true that the answer states "that the sinking of said boat was approximately caused by the natural action, flow and force of said water and was, thereby, an act of God." This, however, is only a conclusion of law and cannot be derived from the facts stated, for the operation of the water, although a natural cause, was neither irresistible, unlooked for nor unusual. Neither is there any testimony to show that there was a sudden storm or any unprecedented convulsion of nature which produced the accident. On the contrary the history of the case is to the effect that the ordinary state of the river and weather conditions for that season of the year were present and that the "Oregona" could have safely negotiated the stream had it not been for the

unexpected presence of the government dredge at anchor in the channel. The giving of this abstract instruction would lead to a reversal of the case under the authority of *Tonseth* v. *Portland Ry. L. & P. Co.*, 70 Or. 341, 347 (141 Pac. 868), but for the following consideration.

10, 11. It will be remembered that the plaintiff declares upon the pure common-law accountability of the defendant as a common carrier while it appears without dispute in the evidence that the shipment was undertaken in pursuance of a written agreement containing material restrictions upon that liability. It was held in *Normile* v. *Oregon Nav. Co.*, 41 Or. 177 (69 Pac. 928, 56 Cent. L. J. 123, 28 Am. & Eng. Ry. Cas. (N. S.) 306), that where the plaintiff declares on a breach of the common-law duty of a carrier and the proof shows that the venture was assumed under a contract for restricted liability it is a failure of proof preventing a recovery by the plaintiff in that action. After pointing out that although the agreement curtails the responsibility of the carrier in certain respects yet if there is enough in the case upon which to found a common-law demand independent of the shipping receipt the action of the plaintiff may proceed, Mr. Justice Wolverton held that on the contrary if on the coming in of the proof it appears that the facts upon which the plaintiff would recover are controlled by a written contract limiting their operation he must fail. The opinion contains this statement:

"Ordinarily the common carrier is considered and treated as an insurer of the goods it undertakes to carry and all limitations of common law liability are in the nature of exceptions to its general undertaking and hence in order to avoid such liabilities the exceptions must be pleaded. Thus it has been held in *Missouri So. Ry. Co.* v. *Nicholson,* 2 Willson, Civ. Cas. Ct. App.,

§ 168, that 'in an action against a common carrier, founded on the common law liability of such carrier, it is not necessary to produce in evidence a bill of lading of the property alleged to have been lost or injured. If there was a special contract, restricting the common law liability of the carrier, it devolved upon the carrier to allege and prove it.' * * And this is just what the defendant has done in the case at bar. It has set up that, by a special agreement, the plaintiff limited himself in his recovery to $100. The plaintiff replied that the alleged agreement was void, as being contrary to sound public policy. If void, the defendant's common law liability remains unchanged and unrestricted in that particular, and the special contract cannot stand in the way of plaintiff's recovery by the common law form of action. If, however, the special agreement is found legal and binding, there is a variance fatal to that form of action, and the plaintiff must be remitted to the special contract and an action thereon," citing authorities.

After disposing of other questions in the case the opinion concludes with the statement that:

"The plaintiff was therefore not entitled to recover upon his common-law action, having entered into a special contract relative to the utmost value of the animal injured, so that the judgment must be reversed, and the cause remanded."

Indeed, in this cause under the uncontroverted evidence concerning the writing relied upon in defense, a verdict should have been directed for the defendant as the plaintiff failed in his proof. The error of abstract instructions therefore becomes negligible for, taking the whole case together, the correct result was attained. In this view it is also unnecessary to consider the assignment of error about the restriction on the argument of counsel.

In any event, there was enough to go to the jury on the question of whether or not the defendant was with-

out fault and exercised the proper skill and prudence in the situation so that the collision with the dredge occurred without blame upon the defendant, bringing it within the exception of "dangers of navigation" and "unavoidable accident." These considerations lead to an affirmance of the judgment. Affirmed.

Mr. Chief Justice McBride, Mr. Justice Benson and Mr. Justice Harris concur.

Modified April 17, 1917.

On Rehearing.

(164 Pac. 189.)

Former opinion modified on rehearing.

Mr. Hall S. Lusk, Messrs. Carson & Brown and *Messrs. Dolph, Mallory, Simon & Gearin,* for appellant.

Mr. Abraham Nelson and *Messrs. Westbrook & Westbrook,* for respondents.

Department 1. Mr. Justice Benson delivered the opinion of the court.

In an able argument the plaintiff urges that the opinion of the court in this case is erroneous because while it holds that the trial court gave to the jury an incorrect instruction, it further determines that this error is negligible for the reason that there was a fatal variance between plaintiff's pleadings and proof which would prevent a recovery in any event. It appears from the record that the complaint bases the right of recovery upon the common-law liability of the carrier

while upon the trial, plaintiff, in his direct case, offered proof of a written agreement expressly limiting such liability. The evidence of this written agreement is nowhere contradicted. It has been repeatedly held by us that where a plaintiff pleads a common-law liability and proves a written contract expressly limiting such liability, he cannot recover: *Normile* v. *Oregon Nav. Co.*, 41 Or. 177 (69 Pac. 928); *Union St. Ry. Co.* v. *First Nat. Bank*, 42 Or. 606 (72 Pac. 586, 73 Pac. 341); *McGregor* v. *Oregon R. & Nav. Co.*, 50 Or. 527 (93 Pac. 465, 14 L. R. A. (N. S.) 668); *Lacey* v. *Oregon R. & Nav. Co.*, 63 Or. 596 (128 Pac. 999). It follows that under the pleadings and proof the plaintiff was not entitled to recover in any event in this particular action. The defendant interposed a seasonable motion for a nonsuit which being resisted by plaintiff was denied.

12. It is now contended that this court should remand the cause to the lower court, with permission to plaintiff to amend his pleadings. This position is based upon the provisions of Section 97, L. O. L., in regard to variance between a pleading and the proof. This section of our Code must be read in connection with Sections 98 and 99, in regard to which it may be said that the phrase "fatal variance" is practically synonymous with the "failure of proof" described in Section 99, L. O. L., and such a variance is termed "fatal" for the reason that it cannot be cured by amendment. Mr. Pomeroy in his work on Code Remedies (4 ed.), at Section 447, classifies disagreements between pleadings and proofs as being of three grades: (1) An immaterial variance; (2) a material variance; and (3) a complete failure of proof. As to the latter he says:

"Finally, if the divergence is total, that is, if it extends to such an important fact, or group of facts, that

the cause of action or defense as proved would be another than that set up in the pleadings, there is plainly no room for amendment, and a dismissal of the complaint or rejection of the defense is the only equitable result'': Pomeroy's Code Remedies (4 ed.), § 448.

13. While it is true that a judgment of nonsuit was the best which plaintiff might have demanded in the trial court, and although he rejected that by resisting the motion therefor, it is equally true that we are unable to find authority for visiting such failure of proof with a more severe penalty than a judgment of nonsuit and consequently a judgment of that character will be entered here. AFFIRMED. MODIFIED ON REHEARING.

MR. CHIEF JUSTICE MCBRIDE, MR. JUSTICE BURNETT and MR. JUSTICE HARRIS concur.

Argued March 30, affirmed April 17, 1917.

MEAGHER *v.* EILERS MUSIC HOUSE.

(164 Pac. 373.)

Appeal and Error—Review—Findings.

1. The findings of the trial court being equivalent to a verdict, the evidence will not be examined on appeal except to ascertain whether any of it is competent to support the findings.

Landlord and Tenant—Landlord's Acceptance of Premises.

2. Where the tenant abandoned the premises and attempted to surrender them to the landlord, and the latter refused to accept them, the landlord's reletting the premises to another for the benefit of the original lessee and "subject to the order and ready for the occupation" of the tenant at any time he should return did not operate as an acceptance of the premises by the landlord.

Landlord and Tenant—Reletting Abandoned Premises.

3. Where a landlord relet abandoned premises for the benefit of the abandoning tenant, but was unable to collect any rent from the

new tenant, the abandoning tenant was liable for the rent, as if the premises had not been relet.

[As to what landlord may do, after abandonment of premises by tenant, and still hold tenant to his obligation, see note in 114 Am. St. Rep. 717.]

From Multnomah: CALVIN U. GANTENBEIN, Judge.

Department 1. Statement by MR. JUSTICE HARRIS.

This is an action to recover part of a deposit given by a lessee to a lessor as security for the payment of rent. The Eilers Music House, a corporation, leased two rooms in the Eilers Building in the city of Portland to D. V. Meagher for a term commencing on July 1, 1912, and ending August 31, 1916, for $13,750 payable "in monthly payments of $275 each, in advance, on the first day of each and every month" during the term. At the time of entering into the agreement of lease with the Eilers Music House, the lessee deposited $550 with the lessor with the understanding that if Meagher performed all his agreements then the deposit "shall be applied to cover the rent" for the last two months of the term; but if Meagher failed to keep his promises or failed promptly to pay the rent "then the said sum of $550 shall be retained by the lessor as liquidated damages for such breach or failure to pay rent." Meagher paid the rent to and including the month of September, 1913, but made no more payments.

After reciting the execution of the lease, the deposit of $550 as security for the payment of the rent, payment of the rent until and including September, 1913, and default in payment for the month of October, the complaint alleges that the lessor "on the 7th day of October, 1913, elected to and did declare the said lease forfeited and rented the same to one R. E. Farrell under a verbal lease until November 7, 1913, when the defend-

ant entered into a written lease for the period of 4 years eleven months." Continuing, the complainant avers that "after deducting the amount of rent due from October 1, 1913, to the time the defendant elected to declare said lease forfeited" the defendant has remaining in its hands and belonging to the plaintiff a balance of $485.83.

The answer denies that the lessor "forfeited" the lease and alleges that Meagher personally occupied the rooms until about August 1, 1913, when he left Portland " for parts unknown and left one Campbell occupying the premises." The defendant avers that subsequently on October 7, 1913, the plaintiff, acting through Campbell, abandoned the premises and

"attempted to surrender the same to the defendant and left the keys for said premises in the place of business of the defendant herein in the city of Portland, without the knowledge or consent of the defendant; that the defendant upon the learning of the vacating and abandoning of said leased premises by the agent of the plaintiff, the said —— Campbell, notified the plaintiff that said premises were still at his disposal and the plaintiff thereupon refused to repossess or to take charge of said leased premises."

The defendant avers that because the rent was not paid for the months of October and November, 1913, it applied the deposit in payment of the rent for those two months and that the rooms were

"left subject to the order and ready for the occupation of the plaintiff at any and all times had the plaintiff returned to Portland to occupy the same, either by himself or any representative until the 30th day of November, 1913."

The parties waived a jury and the cause was tried by the court. After hearing the evidence the court found that Meagher abandoned the premises and at-

tempted to surrender the rooms to the lessor by leaving the keys "in the place of business of defendant" without the knowledge or consent of the lessor, who upon learning of the abandonment notified Meagher that the rooms were at his disposal; that on October 7, 1913, the defendant permitted R. E. Farrell to occupy part of one of the rooms under a verbal agreement to the effect that he could occupy the "premises temporarily and only until the said D. V. Meagher would return and take charge of said leased premises"; and that on November 7, 1913, the defendant entered into a written lease with Farrell for one of the rooms for a period of five years

"said lease to go into effect from and after the 7th day of December, 1913, and which lease was not delivered and was not to be considered binding at any time should D. V. Meagher return and take possession and occupy said premises under his said lease."

The court also found that the

"leased premises were left subject to the order and ready for the occupation of the said D. V. Meagher at any and all times had he returned to Portland to occupy the same either by himself or any representative until after the end of November, 1913, and the said D. V. Meagher was not ejected from said premises and the defendant did not elect to, and did not declare said lease forfeited for non-payment of rent or otherwise until after the end of the month of November, 1913, and the defendant did not collect any money or rent from the said Farrell or from any other person for said premises for the said months of October and November or either of them excepting as the defendant received the rent for said premises during the said two months by charging the same against the said deposit of $550.00 upon failure of the said D. V. Meagher to pay the rent for said two months or either of them."

The trial court ruled that, on the facts found by him, the plaintiff was not entitled to recover and consequently a judgment was entered for the defendant, and the plaintiff appealed. AFFIRMED.

For appellant there was a brief and an oral argument by *Mr. W. L. Cooper.*

For respondent there was a brief and an oral argument by *Mr. Miller Murdoch.*

MR. JUSTICE HARRIS delivered the opinion of the court.

Quoting from the printed brief filed by the plaintiff:

"So the only question we have to present to this court at this time is: Was the leasing of the building to Farrell an acceptance of the surrender of the lease by the tenant or was the building leased to Farrell for the benefit of the plaintiff as alleged in the defendant's answer?"

1. The findings of the trial court are equivalent to a verdict and consequently upon appeal the evidence will not be examined except to ascertain whether any of it is competent to support the findings: *Eugene* v. *Lowell,* 72 Or. 237 (143 Pac. 903); *Weigar* v. *Steen,* 81 Or. 72, 74 (158 Pac. 280).

There was evidence relating to the facts found by the trial court and hence we shall make no further inquiry concerning the evidence.

In brief the facts as found by the court disclose a lease, a deposit to secure the payment of rent, a default in the payment of rent, an abandonment of the premises by the lessee and reletting by the lessor but "subject to the order and ready for the occupation" of Meagher at any and all times. The plaintiff contends that reletting one of the rooms to Farrell of it-

self terminated the lease to Meagher. The defendant argues that the reletting was for the benefit of Meagher and subject to his lease, and that therefore the first lease was not affected by the reletting.

The instant case does not present a situation where there was an agreement of the lessor and lessee manifesting an intention to cancel the lease, or where there was a surrender by the lessee and an express acceptance by the lessor, or where there was an express release by the lessor, or where the lessor has himself actually put the tenant out of possession by legal process or otherwise, or where the landlord has given notice of the termination of the lease; and consequently we must put aside most of the authorities relied upon by plaintiff, such as *Carson* v. *Arvantes,* 27 Colo. 77 (59 Pac. 737); *Cunningham* v. *Stockon,* 81 Kan. 780 (106 Pac. 1057, 19 Ann. Cas. 212); *Sutton* v. *Goodman,* 194 Mass. 389 (80 N. E. 608); *Hall* v. *Middleby,* 197 Mass. 485 (83 N. E. 1114); *Hecklau* v. *Hauser,* 71 N. J. Law, 478 (59 Atl. 18); *Michaels* v. *Fishel,* 169 N. Y. 381 (62 N. E. 425); *Scott* v. *Montells,* 109 N. Y. 1 (15 N. E. 729); *Caesar* v. *Rubinson,* 174 N. Y. 492 (67 N. E. 58).

2. Meagher abandoned the premises and attempted to surrender them to the lessor but the latter refused to accept the surrender, unless it can be said that the reletting to Farrell of itself operated as an acceptance. In reletting to Farrell for October and November, the Eilers Music House did all that it could have done to manifest its purpose to continue the leasehold interest of Meagher for it let the room to Farrell subject to the lease of Meagher, and possession of the premises could have been had by the latter "at any and all times had he returned to Portland." The letting to Farrell did not operate to exclude Meagher, but on the

contrary Meagher's right was preserved, and until the end of November both the defendant and Farrell recognized that Meagher's right was superior to any right granted to Farrell. Upon the abandonment of the premises the lessor could have left the rooms vacant and, without attempting to relet them, it could have applied the deposit in payment of the rent for October and November. Releting one of the rooms was for the benefit of Meagher since liability under the lease was reduced to whatever extent rentals were paid on the releting. Some authorities declare that a releting is of itself a termination of the lease while others hold to the contrary. Some precedents declare that the right to relet is dependent upon the consent of the lessee, express or implied, and this line of precedents involves the element of prior notice to the lessee, but within the rule of this class of cases the lessor could not relet and at the same time preserve the first lease if the whereabouts of the original lessee were unknown; and, moreover, many adjudications adhering to this doctrine strikingly illustrate the extremes to which courts have been pushed in order to hold that a releting was with the consent of the lessee. It is not necessary, however, to analyze the reasoning of the cases announcing the variant doctrines in the different jurisdictions, for a quarter of a century ago this court took its place with those tribunals which hold that a landlord may relet for the benefit of an original lessee who has abandoned the premises, and that the act of releting does not of itself necessarily effect a termination of the lease. The Eilers Music House did not repossess itself of its former estate, but it did what it did for the benefit of the lessee and subject to his recognized, admitted and preserved right to the possession of the premises. If the landlord had done noth-

ing the lessee would nevertheless have been liable for the full rental even though the premises had remained vacant; and the lessee should not complain if the landlord did its best to minimize his liability. This conclusion is not only in conformity with *Bowen* v. *Clarke*, 22 Or. 566 (30 Pac. 430, 29 Am. St. Rep. 625), but it is also in complete harmony with many other well-considered adjudications: *Respini* v. *Porta*, 89 Cal. 464 (26 Pac. 967, 23 Am. St. Rep. 488); *Humiston, Keeling & Co.* v. *Wheeler*, 175 Ill. 514 (51 N. E. 893); *Marshall* v. *John Grosse Clothing Co.*, 184 Ill. 421 (56 N. E. 807, 75 Am. St. Rep. 181); *Auer* v. *Penn*, 99 Pa. St. 370 (44 Am. Rep. 114). See, also, the exhaustive note to *Higgins* v. *Street*, as reported in 13 L. R. A. (N. S.) 398.

3. The Eilers Music House was not able to collect any money from Farrell; and according to the finding of the trial court the landlord did not collect rent from any person for the months of October and November except as rent was received by applying the deposit in payment of the rental; and hence the defendant is not chargeable with moneys that it did not receive and could not collect from Farrell. The judgment is affirmed. AFFIRMED.

MR. CHIEF JUSTICE MCBRIDE, MR. JUSTICE BENSON and MR. JUSTICE BURNETT concur.

Argued March 23, reversed and remanded April 10, 1917.

CROWDER *v.* YOVOVICH.*

(164 Pac. 576.)

Fraud—Evidence—Question for Jury.

1. In a suit for damages for deceit in the sale of lands, the value of furniture owned by plaintiff and given in exchange as a part of the consideration for the conveyance of defendant's land, *held* for the jury.

Appeal and Error—Review—Findings.

2. A jury finding on conflicting evidence will not be disturbed on appeal, if there is any evidence to sustain it.

Fraud—Principal and Agent—Undisclosed Principal—Right to Sue for Damages for Deceit.

3. As the rule that an undisclosed principal may sue upon a contract made by his agent to the same extent as if its relation to the contract was known at the time it was entered into does not apply to the case where an alleged agent made affidavit that he was the owner of personal property exchanged for real estate, and gave a promissory note in his own name, and in every way acted as principal in making the contract, and hence the undisclosed principal cannot sue for deceit practiced upon the agent.

Evidence—Parol Evidence to Vary Written Agreement.

4. Where the agent of an alleged undisclosed principal annexed to his bill of sale of the personal property exchanged for real estate, an affidavit that he is the owner of such property, parol evidence tending directly to contradict the terms of the bill of sale was not admissible.

Estoppel—Undisclosed Principal—Right to Sue for Damages for Deceit.

5. Where the owner of personal property permitted an alleged agent to contract for the exchange of such property for real estate, and represent himself as principal in the contract as owner of the property, and to give his personal obligation as such, such owner was forever barred from contradicting the alleged agent's misrepresentations, and had no cause of action for deceit practiced upon the agent.

[As to suits by undisclosed principals on contracts made with their agents, see note in 55 **Am. St. Rep.** 916.]

Parties—Pleading—Plea in Abatement.

6. Where a complaint in an action for deceit practiced on plaintiff in exchange of personal property for real estate stated a cause of

*On character of contract as affecting right of undisclosed principal to sue thereon, see note in 29 **L. R. A. (N. S.)** 472; 39 **L. R. A. (N. S.)** 324.

Generally on the question that parol evidence is not admissible to vary, add to or alter a written instrument, see note in 17 **L. R. A.** 270.

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action, and did not state that the contract was made by or through an agent, or alleged representations were made to an agent of plaintiff, the defense in such exchange dealt with another person who purported to act as principal, and that plaintiff had no capacity to sue as undisclosed principal, was not in the nature of a plea in abatement.

From Multnomah: CALVIN U. GANTENBEIN, Judge.

Action by Bertha M. Crowder against Yanko Y. Yovovich. From a judgment in favor of plaintiff, defendant appeals. Reversed and remanded.

Department 2. Statement by MR. CHIEF JUSTICE MCBRIDE.

This is a suit to recover damages for deceit in the sale of lands. The complaint alleges that on June 17, 1914, plaintiff owned certain furniture, including bedroom suites, chairs, etc., situated in a rooming-house in the City of Portland, and that defendant was the owner of a certain 40-acre tract of land situated in Lane County, Oregon; that at said date defendant by reason of false representations as to the character and capabilities of the land, all of which are particularly set forth in the complaint, induced plaintiff to purchase the same and to give in exchange therefor the personal property described in the complaint and to execute to defendant a note for $295, secured by a mortgage upon the land conveyed; that the land was practically worthless, and that upon discovery of his fraudulent representations she tendered back to him a warranty deed to the same, and demanded a restoration of the property conveyed to him, but defendant refused to accept such conveyance or to restore said property; that by reason of defendant's fraudulent conduct she has been damaged in the sum of $2,500. The defendant answered denying the alleged fraudulent representations and asserting the property transferred to him was not worth to exceed $400 over and

above an indebtedness of $295 due thereon. The answer denied plaintiff's ownership of the personal property assigned to him, and alleged that he conveyed the land to one J. A. Barnes, and that the furniture and fixtures were in the name of J. A. Barnes. On the trial the plaintiff testified that she was the actual owner of the property; that it was held in the name of J. A. Barnes; that she had several conversations with defendant during the negotiations; that she did not remember telling him that Barnes was the owner of the furniture; that she was trying to keep her name out of it; that all the money invested in the lodging-house and furniture was hers absolutely; and that Barnes had never contributed a cent toward its purchase. Barnes testified to the same effect; that Mrs. Crowder purchased the property from Nellie Stacey with her own money, that the bill of sale was made to him at plaintiff's request, and that he held it as trustee for her. De Forest testified that it was listed for sale in his office by Barnes, but that he had always supposed until the bill of sale to defendant was made out that plaintiff was the real owner of the property. The bill of sale of the furniture, etc., was executed by Barnes, and to it was attached the following affidavit:

"State of Oregon,
County of Multnomah,—ss.

"I, J. A. Barnes, being first duly sworn on oath depose and say that I am the sole and lawful owner of the goods mentioned in the within bill of sale, and that same are free from all incumbrances except the sum of $295 due Edwards Company of the city of Portland, Oregon, as set forth within the bill of sale.

"J. A. BARNES.

"Subscribed and sworn to before me this 18th day of June, 1914.

"CARL J. WANGERIEN,
"Notary Public for Oregon."

At the same time and as a part of the same transaction defendant executed and delivered to Barnes, as grantee, a warranty deed to the land described in the complaint, and Barnes executed a promissory note in favor of defendant for the sum of $295, with interest at 7 per cent per annum, payable three years after date, and also executed and delivered a mortgage upon the land to secure the same. Prior to the commencement of this action he executed a conveyance of the land to plaintiff. Upon the trial there was a verdict and judgment for plaintiff for the sum of $600 damages, from which defendant appeals.

REVERSED AND REMANDED.

For appellant there was a brief over the name of *Messrs. Johnson & Mathews,* with an oral argument by *Mr. George C. Johnson.*

For respondent there was a brief over the names of *Mr. Fred W. Hummell* and *Messrs. Wilbur, Spencer & Beckett,* with an oral argument by *Mr. Hummell.*

Opinion by MR. CHIEF JUSTICE MCBRIDE.

1, 2. The testimony as to the false representations and as to the value and character of the land is very conflicting. Plaintiff's witnesses place it all the way from a mere nominal value up to not in excess of $400, while defendant's witnesses value it from $1,000 up to $7,500, including the timber; and this estimate if we were to credit it would indicate that defendant was badly worsted in the trade. On the other hand, defendant's witnesses place a value as low as $300 upon the furniture, etc., while some of plaintiff's witnesses place it as high as $1,800. All this was for the jury, and we are not permitted to disturb the verdict in that

respect if there is any evidence to sustain it, as there certainly is.

3. The principal contention here centers around the admission of the oral testimony of plaintiff and Barnes tending to show that she was the real owner of the property traded to defendant and that Barnes was acting as her agent. The testimony does not disclose that defendant was ever informed that plaintiff was the real principal, but rather that this fact was kept in the background; plaintiff testifying, "I wanted to keep my name out of it." It is a familiar rule that an undisclosed principal may sue upon a contract made by his agent to the same extent as if his relation to the contract were known at the time it was entered into: 2 Mechem on Agency (2 ed.), § 2059, and cases there cited. It would seem logically to follow that the undisclosed principal can recover damages for a deceit practiced upon his agent in the course of a transaction in any case in which he would have a legal right to enforce the contract if no deceit had been practiced. But to the rules above announced there are exceptions as firmly supported by precedent as are the rules themselves, and we are of the opinion that this case comes within these exceptions, which are thus stated by Mr. Mechem:

"Section 2070. Principal cannot sue where terms of contract exclude him or where contract is solely with agent personally. The right of the principal to sue upon the contract made by the agent in his own name flows from the fact that the agent made the contract in reality, though perhaps this may have been unknown to the other party, as the agent of the principal, and by his authority; and the principal is, therefore, entitled to enforce the contract, not only upon the ground that the benefits of his agent's acts accrue to him, but also upon the ground that he is himself, when discovered, liable upon the contract to the other

party. If, however, as is competent to be done, the other party has, (1) dealt with the agent as being in fact the principal and upon terms in a written contract which exclude the existence of any other principal; or (2) with knowledge of the agency, has elected to deal with the agent alone, and the agent has pledged his individual credit, there it is held that the undisclosed principal is not a party to the contract and cannot enforce it. To permit the principal to enforce the contract in the first case is to contradict the writing; and, in the second, to deny to the other party the benefit of his choice of parties. Every man has a right to determine for himself what parties he will deal with, and if the other party has expressly dealt with the agent, as the party to the contract, to the exclusion of a principal, he cannot be made liable to the principal."

Here the contract is expressly with the alleged agent. The credit for the deferred payment is extended to him. His promissory note is taken for it, and his mortgage secures the note, and with the knowledge and acquiescence of his alleged principal he annexes to his bill of sale of the property an affidavit in which he swears that he is the owner of the property. The oral evidence offered tended directly to contradict the terms of a written instrument and was inadmissible. The leading English case on this subject is *Humble* v. *Hunter,* 64 Eng. C. L. 310. In this case the plaintiff sued the defendant on a charter party executed by her son, as her agent, in his own name without disclosing to the defendant that he was such agent. The contract read:

"It is mutually agreed between C. J. Humble, Esq., owner of the good ship or vessel called The Ann," etc.

The court refused to hear evidence that the son was not the real principal, distinguishing the case from the ordinary one of an undisclosed principal suing on a written contract, on the ground that the son in this

case *expressly* stipulated that he was the owner of the ship and the principal in the transaction, and that, therefore, the evidence contradicting the writing was inadmissible; saying, among other things, that the doctrine that an undisclosed principal may demand the benefits of a contract made by his agent "cannot be applied where the agent contracts as principal; and he has done so here by describing himself as 'owner' of the ship." The same rule was announced by Mr. Chief Justice MARSHALL in *Graves* v. *Boston Marine Ins. Co.*, 6 U. S. 418, 438 (2 L. Ed. 324), a case in equity to correct a policy by reason of an alleged mistake whereby it was claimed that the names of some of the real principals had been omitted: See, also, *Winchester* v. *Howard*, 97 Mass. 303 (93 Am. Dec. 93); *Moore* v. *Vulcanite etc. Co.*, 121 N. Y. App. Div. 667 (106 N. Y. Supp. 393); *Darrow* v. *Horne Produce Co.*, 57 Fed. 463; *Kelly* v. *Thuey et al.*, 102 Mo. 522 (15 S. W. 62), overruled in *Kelly* v. *Thuey*, 143 Mo. 422 (45 S. W. 300), by a divided court; *Thomas* v. *Kerry*, 66 Ky. [9 Bush] 619 (96 Am. Dec. 262); *Boston Ice Co.* v. *Potter*, 123 Mass. 28 (25 Am. Rep. 9). None of the cases cited by plaintiff contradict or question the doctrine announced in *Humble* v. *Hunter*, or in *Graves* v. *Boston, etc., supra*, but they are all cases where the alleged agent has not affirmatively represented himself as owner.

5. Another reason why plaintiff should not be allowed to stand in the position of an undisclosed principal is that she stood by and allowed Barnes to represent himself as principal and to contract and give his personal obligation as such. As remarked in *Humble* v. *Hunter*, 64 Eng. C. L. 310, such a rule would deny to the other party the benefit of his choice of parties. Every man has a right to determine for

himself what parties he will deal with and if the other party has expressly dealt with the agent as the party to the contract to the exclusion of a principal he cannot be made liable to the principal: *Boston Ice Co.* v. *Potter,* 123 Mass. 28 (25 Am. Rep. 9). In order to uphold the judgment in the case at bar we would be compelled to ignore the sworn representation of Barnes, made with the acquiescence of plaintiff, that he was the owner of the furniture described in his bill of sale, as well as of the negotiable note and mortgage given by him, and to require defendant to litigate his contract with a person with whom he had no intention of contracting. We are of the opinion that the plaintiff cannot maintain this action.

6. It is further contended that the defense urged was that the plaintiff had no legal capacity to sue, and that such defense was in the nature of a plea in abatement, and not having been so pleaded it was waived. This contention is not sound. The complaint did not in any form state that the contract was made by or through an agent or that the alleged misrepresentations were made to an agent of plaintiff. It stated a good cause of action. The proof showed a state of facts which, as we hold, showed that plaintiff did not at the commencement of the suit have any cause of action. The fact that defendant traded with another person and in the course of the trade made material false representations to him could not under any circumstances "give plaintiff a better writ," nor enable her at any time in the future to prosecute an action. If A assaults B and injures him, and C brings an action for damages asserting that he was the person assaulted, and that fact is denied, this does not raise an objection predicated upon his want of capacity to sue, but upon his right to recover. There is a failure

of proof as to the fact of his being injured. So here there was no legal right in plaintiff to recover, and the nature of the transaction was such that she could adduce no legal evidence that she was the person injured. In *Dewey et al.* v. *State,* 91 Ind. 173, 182, the court states the distinction above enunciated as follows:

"It is settled by the decisions of this court that the second statutory cause of demurrer, namely, 'that the plaintiff has not legal capacity to sue,' has reference only to some legal disability of the plaintiff, such as infancy, idiocy, or coverture, and not to the fact * * that the complaint fails to show, upon its face, a right of action in the plaintiff."

To the same effect is *Pence* v. *Aughe,* 101 Ind. 317, and many other cases. See, also, 1 Corpus Juris, page 28, Section 9, where the rule is thus stated:

"Matter in abatement, which goes merely to defeat or suspend the present suit, and does not conclude plaintiff from maintaining an action upon the cause stated, and which is, therefore, to be set up by plea or answer in abatement, is to be distinguished from matter in bar, which goes to the merits and shows that plaintiff has no cause of action."

In the case at bar the plaintiff having permitted Barnes expressly to contract as owner of the property was forever barred from contradicting his written representations to this effect, and, therefore, had no cause of action which she could enforce by an action at law.

The judgment is reversed and the cause remanded to the Circuit Court for proceedings not inconsistent with this opinion. REVERSED AND REMANDED.

MR. JUSTICE MOORE, MR. JUSTICE BEAN and MR. JUSTICE MCCAMANT concur.

Submitted on brief April 2, writ dismissed April 17, 1917.

SCHOOL DISTRICT No. 24 *v.* SMITH.

(164 Pac. 375.)

Schools and School Districts—District Expenses—Statutory Construction.

1. Under General Laws 1915, page 331, Section 4, providing that cost of educating a high school pupil be fixed by dividing the cost of maintaining the schools by the average daily attendance, etc., interest items paid on debt incurred for construction of the school cannot be included in the maintenance charges.

Original proceeding in Supreme Court in *mandamus* on amended writ.

An original *mandamus* proceeding by School District No. 24 of Marion County, Oregon, against W. M. Smith, County School Superintendent of Marion County, Oregon. The demurrer filed by defendant sustained and amended writ dismissed. Submitted on brief without argument under the proviso of Supreme Court Rule 18: 56 Or. 622 (117 Pac. xi). Dismissed.

In Banc. Statement by MR. CHIEF JUSTICE MCBRIDE.

This matter was originally heard in this court, and is reported in 82 Or. 443 (161 Pac. 706). By an amended writ it is alleged that the district was compelled to borrow $70,000 of the $135,000 used to construct the building; that there has been paid during the school year of 1916 the sum of $3,500 as interest on the sum so borrowed, and that the defendant refuses to allow such sum as a part of the amount "expended by the high school district for maintaining high school" during that year. This is the sole issue raised by the amended writ, to which defendant demurs. AMENDED WRIT DISMISSED.

For petitioner there was a brief over the name of *Messrs. Smith & Shields.*

For defendant there was a brief over the names of *Mr. Max Gehlhar,* District Attorney, and *Mr. James G. Heltzel,* Deputy District Attorney.

Opinion by Mr. Chief Justice McBride.

1. The words "maintain," "maintenance," and "maintaining" have such varied meanings in statutes that no mere lexicographical definition will fit every particular statute. Their meaning in each case is to be derived from a consideration of the whole statute, the circumstances under which it was enacted, and the object to be attained with a view to ascertain that somewhat elusive thing called the "intent" of the lawmaker. In our original opinion we stated that the word "expended" means "paid out, disbursed"; but this language was applied to the matter then before the court and, of course, with reference to moneys expended for the purpose of maintaining the school. There is a distinction to be drawn here between maintenance and construction. It has been held in many cases that a statute authorizing a corporation or municipality to "maintain" a building, a street, or a road does not confer authority to construct such building or other improvement: *Barber Asphalt Paving Co.* v. *Hezel,* 155 Mo. 391 (56 S. W. 449, 48 L. R. A. 285); *Moorhead* v. *Little Miami R. Co.,* 17 Ohio, 340; *In re Warren Insane Hospital,* 15 Pa. Co. Ct. Rep. 83.

"The word 'maintain' does not mean to provide or construct, but means to keep up, to keep from change, to preserve": Worcester's Dict.

"To hold, to keep in any particular state or condition, to keep up": Webster's Dict.

From these definitions it would seem that the cost of constructing a school building could hardly be construed as part of the expense of maintaining a school in a building already constructed. The statute now under consideration presupposes a high school building already erected: it does not require any district to erect one to accommodate pupils from any other district. Indeed the statute might well be called permissive in its character, and it was probably not in the legislative mind that the high school districts provided with buildings would increase their capacity or employ an extra force of instructors for the accommodation of pupils of other districts who might wish to take advantage of their facilities, nor is it likely that the petitioner here has employed an additional teacher or incurred a dollar of expense in excess of that which it would have expended if no outside pupils had attended its high school, unless it be a very trifling amount expended for supplies. It is not every dollar paid out during the year on account of the construction of a high school building that may be said to be a part of the expense of maintaining the school. Such a theory would lead to results so absurd that it cannot be held to have been within the legislative intent. If instead of merely paying the interest upon the debt the principal had been discharged upon that theory, the whole $70,000 would have to be charged up as a part of the maintenance of the high school, because it was money expended during that year. It seems to be assumed by petitioner that the $70,000 indebtedness incurred in construction is something in the nature of a lien against the building and that the school cannot be held unless the interest is kept up, and that for this reason it is in a way a maintenance charge; but this is not the case. Should a default in

interest occur, there is no law by which the building could be taken. But it is needless to speculate upon contingencies which in the nature of things are not likely to arise. It was not the purpose of the law that high school districts should make a profit off of their less fortunate neighbors, or off of the general taxpayers; neither was there a purpose to compel outside taxpayers to contribute directly or indirectly to the erection of buildings. It evidently was the intention to permit districts having high school buildings to enter outside pupils and to receive from the educational fund of the county the actual cost of educating them, and nothing more. This includes salaries of teachers and caretakers for the building, supplies of a temporary character, lights, telephones, water, insurance, and such repairs as are necessary to keep the building in a state of efficiency, but it does not include money paid for construction nor interest upon money borrowed for such purpose.

The demurrer is sustained and the amended writ dismissed. DISMISSED.

Argued April 4, affirmed April 17, 1917.

REIMERS *v.* BRENNAN.*

(164 Pac. 552.)

Evidence—Cross-examination of Expert—Value.

1. Evidence of particular sale is permitted upon cross-examination in proving value in order to test the qualification of the witness.

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*On right of purchaser to rely on representations made to effect contract as a basis for a charge of fraud, see note in 37 **L. R. A.** 610; 14 **L. R. A. (N. S.)** 1210.

Generally on the question of right to impeach one's own witness, see note in 21 **L. R. A.** 418.

On admissibility of previous statements by a witness out of court consistent with his testimony, see note in 41 **L. R. A. (N. S.)** 857.

REPORTER.

Witnesses—Cross-examination—Scope—Discretion of Court.

2. In action for damages for fraudulent representation in exchange of real estate, it was a proper exercise of the court's discretion to exclude cross-examination of a defendant to elicit the fact that the property received by him and his wife in exchange was sold two years after the exchange at an advance in value, since both the *bona fides* of that transaction and the value of the property received by defendants were collateral issues.

Witnesses—Impeaching One's Own Witness.

3. Under Section 861, L. O. L., as to impeaching one's own witness, a witness may be contradicted by a party calling him, where the witness gave testimony damaging to the party calling him on the ground of surprise, by showing that he has made at other times statements inconsistent with his present testimony, as provided in Section 864, as to impeaching witness by inconsistent statements, although the party producing the witness is not allowed to impeach his credit by evidence of bad character.

[As to impeaching one's own witness, see note in **Ann. Cas.** 1914B, 1120.]

Trial—Instructions—Reliance on Representation.

4. In action for fraud in exchange of realty, an instruction upon right of plaintiffs making an investigation of the property to rely on defendants' representations, *held* to fairly submit the issues, when considered as an entirety.

Fraud—Reliance on Representations.

5. A purchaser must use reasonable care for his own protection and should not rely blindly upon statements made by a seller; and between parties dealing at arm's-length, where no fiduciary relation exists and no device or artifice is used to prevent an investigation, it is the general rule that a purchaser must make use of his means of knowledge, and, failing to do so, he cannot recover on the ground that he was misled by the seller.

Fraud—Inspection—Reliance on Representations.

6. Where there has been an inspection by a person making an exchange of property, false representations as to the value cannot, as a rule, be made the basis of an action for damages.

From Multnomah: GEORGE N. DAVIS, Judge.

Edward Reimers and Eva Reimers, his wife, commenced this action against T. F. Brennan and Blanche Brennan, his wife, to recover damages. From a judgment in favor of defendants, plaintiffs appeal. Affirmed.

Department 2. Statement by MR. JUSTICE BEAN.

This is an action to recover damages for alleged fraudulent representations in an exchange of real

properties. The jury returned a verdict in favor of the defendants upon which a judgment of dismissal was entered, and plaintiffs appeal.

It appears that in August, 1913, the plaintiffs were the owners of a 200-acre ranch in Douglas County, Oregon, worth $9,000 they claim, which they traded to the defendants for lot 22, block L, Greenway's Addition to Portland, Oregon, facing on two streets, upon which was situated a double flat building and a bungalow. They claim that the defendants' property was not worth over $5,355.55, and that it was traded to them on the basis of a valuation of $13,000, while their real estate was taken in exchange at $9,000, leaving a difference of $4,000, for which they executed to defendants a mortgage upon the Portland realty. The evidence shows that after some preliminary negotiations conducted by correspondence, plaintiff Reimers went to Portland and made a careful examination of the Brennan property. He also called upon a Mr. Meves, a restaurant-man of his acquaintance, and discussed with him the desirability and value of defendants' premises. Mr. Meves referred him to a Mr. Lofgren, an attorney, whom he consulted with reference to Portland values, and particularly in regard to the worth of the defendants' property. He also investigated one or two other propositions offered in exchange for his farm. He informed the Brennans that Mrs. Reimers would come to Portland in a few days and inspect the premises, which she did. In the meantime Mr. Brennan visited the Roseburg ranch and an exchange as stated was thereupon effected upon the basis mentioned. After the exchange the Brennans went into possession of the farm and the Reimers took possession of the city property. No complaint was made by the plaintiffs to the defend-

ants for nearly a year after the deal, when this action was filed. AFFIRMED.

For appellants there was a brief over the name of *Messrs. Clark, Skulason & Clark,* with an oral argument by *Mr. Bardi G. Skulason.*

For respondents there was a brief over the name of *Messrs. Stapleton & Conley,* with an oral argument by *Mr. J. L. Conley.*

MR. JUSTICE BEAN delivered the opinion of the court.

The questions in issue are the value of the property and whether or not the defendants made fraudulent representations to the plaintiffs by which the exchange was consummated and on account of which they were damaged. During the course of the cross-examination of the defendant J. F. Brennan, and of certain other of the defendants' witnesses, counsel for plaintiffs on cross-examination, sought to inquire whether the defendants had sold the Douglas County property for $15,000 within two years after the exchange. This line of cross-examination was objected to by counsel for defendants and held improper by the court. Thereupon the plaintiffs made an offer of proof in accordance with the questions asked, which was refused and exceptions duly saved.

1, 2. Evidence of particular sales is permitted upon cross-examination in proving value in order to test the qualification of the witness. In the present case the witnesses were thoroughly examined as experts. It should also be kept in mind that plaintiffs were endeavoring to prove value in order to show fraud on the part of the defendants. If they had been permitted to show that about two years after the exchange of the properties in question the defendants had sold

the ranch for $15,000, then the question of the *bona fides* of that transaction, the terms, and the kind of payment, would have been opened for investigation and another distinct issue raised instead of one being settled: *East Penn. R. R.* v. *Hiester,* 40 Pa. St. 53. The facts in regard to the terms and circumstances of the sale of the farm were not in evidence nor tendered.

There is another reason why plaintiffs should not be heard to question this ruling. In their pleading they complain that the defendants misrepresented and overvalued the Portland property. By the evidence offered they are attempting to show that they undervalued the ranch which they themselves traded in exchange. Value witnesses were called as to the real estate in both counties, and the question was fairly submitted to the jury. It was not an abuse of discretion for the trial court to curtail the cross-examination in the ruling complained of: *Krebs Hop Co.* v. *Livesley,* 55 Or. 227, 234 (104 Pac. 3); *McIntosh* v. *McNair,* 63 Or. 57, 65 (126 Pac. 9); *Furbeck* v. *Gevurtz,* 72 Or. 12 (143 Pac. 922).

3. Upon the examination in chief of Mr. Sykes, witness for the defendants, their counsel questioned the accuracy of their own witness over the objection of plaintiffs and later on called another witness named Barber, by whom they were permitted to prove certain contradictory statements made by the witness before he was called to the stand, which was objected to by counsel for plaintiffs as hearsay, not proper impeachment, and exceptions were saved to the ruling of the court allowing the same. Under Section 861, L. O. L., a witness may be contradicted by a party calling him where the witness gives testimony damaging to the party calling him on the ground of sur-

prise, by showing that he has made at other times statements inconsistent with his present testimony, as provided in Section 864, although the party producing the witness is not allowed to impeach his credit by evidence of bad character.

4–6. In a very general way counsel for plaintiffs saved an exception to the court's charge to the jury in regard to the investigation of the property made by the plaintiffs and not relying upon the representations made by the defendants. After defining fraud and misrepresentation, among other things the court advised the jury to the effect that in order to constitute fraud they must find that the person to whom the representations were made, the plaintiffs in this case, believed them, relied upon them, and were induced by reason of them to enter into the deal in this particular case; and further that:

"However, the law does not excuse persons, dealing the one with the other, from the use of their ordinary senses, in other words, the law requires persons dealing at arm's-length to use the ordinary care and precaution,—of men in the ordinary business walk of life. And if in this case you believe from the testimony that these plaintiffs undertook to make an investigation of the properties belonging to the defendants, and did make such an investigation, then the law will not permit them to say,—after we have made this investigation and satisfied ourselves as to the circumstances, and condition of the properties,—the law will not permit them to say,—'We are not going to rely upon our investigation, but are going to rely upon your statements.' "

It is suggested by plaintiffs' counsel that the instruction in regard to the ruling upon misrepresentation was too narrow. Taking the last part of the quoted charge alone, it might possibly be subject to criticism, but taking it as an entirety we believe there

would be no danger but that the jury would understand the direction of the court that in order to constitute actionable fraud, among other things pointed out, they must find that the plaintiffs relied upon the false representations of the defendants: *Poppleton* v. *Bryan,* 36 Or. 69 (59 Pac. 549). A purchaser must use reasonable care for his own protection and should not rely blindly upon statements made by a seller, and between parties dealing at arm's-length, where no fiduciary relation exists and no device or artifice is used to prevent an investigation, it is the general rule that a purchaser must make use of his means of knowledge, and failing to do so he cannot recover on the ground that he was misled by the seller: 30 Cyc. 49; *Allen* v. *McNeelan,* 79 Or. 606 (156 Pac. 274); *Poland* v. *Brownell,* 131 Mass. 138 (41 Am. Rep. 215). Where there has been an inspection by a person making an exchange of property, false representations as to the value cannot as a rule be made the basis of an action for damages: 2 Pom. Eq. Jur, § 892; *Allen* v. *McNeelan,* 79 Or. 606 (156 Pac. 274); *Farrar* v. *Churchill,* 135 U. S. 609 (34 L. Ed. 246, 10 Sup. Ct. Rep. 771); 14 Am. & Eng. Enc. Law, 112. The charge given by the court to the jury fairly submitted to them the issues to be tried. Finding no error in the record the judgment of the Circuit Court is affirmed.

AFFIRMED.

MR. CHIEF JUSTICE MCBRIDE, MR. JUSTICE MOORE and MR. JUSTICE MCCAMANT concur.

Argued April 11, reversed and suit dismissed April 17, 1917.

BOARDMAN *v.* INSURANCE CO. OF STATE OF PENNSYLVANIA.*

(164 Pac. 558.)

Reformation of Instruments—Complaint.

1. In action to reform an instrument, the complaint must distinctly allege what the original agreement of the parties was, and clearly and precisely point out wherein there was a misunderstanding, that the mistake was mutual and did not arise from the gross negligence of the plaintiff, or that his misconception originated in the fraud of the defendant.

Reformation of Instruments—Mutuality of Mistake.

2. That an instrument does not express the intent of one of the parties, but does conform to that of the other, does not warrant its reformation, since a contrary rule would destroy the principle of mutuality of contract.

Reformation of Instruments—Evidence—Sufficiency.

3. In an action for reformation of an instrument, the testimony as to the real contract intended between parties must be clear and convincing, and, if it is at an equal balance either as to what the agreement was or as to the mutuality of the mistake, reformation will not be allowed.

Reformation of Instruments — Evidence — Sufficiency — Insurance Policy.

4. In suit to reform and recover upon an insurance policy, evidence *held* not sufficient to show mistake by the insurance company in writing the policy.

Reformation of Instruments—Grounds—Waiver of Policy Conditions.

5. In suit to reform an insurance policy, waiver of the conditions of the policy as to change of ownership by failure of the company to inquire about the ownership was not available; such ground of recovery being available only in an action at law on the policy.

[As to causes and proceedings for reformation of instruments, see note in 65 **Am. St. Rep.** 481.]

Insurance—Conditions—Waiver.

6. Under Standard Policy Law (Title XXXIV, Chapter 6, L. O. L.), Sections 4666, 4668, as amended by Laws of 1911, page 279, the statutory conditions as to ownership of insured property cannot be waived except in the manner provided in statute itself, which must be in writing attached to or upon the face of the policy.

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*On reformation of insurance policy for mistake of soliciting agent, see note in 11 **L. R. A. (N. S.)** 357. REPORTER.

From Multnomah: GEORGE N. DAVIS, Judge.

Suit by E. C. Boardman and S. Bartle, comprising the partnership firm of Boardman & Bartle, against the Insurance Company of the State of Pennsylvania, Theodore Trautman and R. C. Allen, to reform an insurance policy. There was a decree for plaintiffs and defendant insurance company appeals. Reversed. Suit Dismissed.

Department 1. Statement by MR. JUSTICE BURNETT.

This is a suit by the partnership of Boardman & Bartle to correct an alleged mistake in an insurance policy issued by the defendant company so as to strike out the words "Boardman & Miller" and insert therein "Boardman & Bartle" as the name of the insured firm. The complaint asserts substantially that on or about December 18, 1914, the defendant with full knowledge that plaintiffs were in possession of and claimed to be the owners of the property described, issued a policy in the name of Boardman & Miller, whereas the intention of all concerned was to insure Boardman & Bartle and that this was a mutual mistake and inadvertence of both parties. They further declare upon the policy as sought to be reformed in a way to recover the amount specified therein for the loss of the property by fire occurring August 3, 1915, within the period for which the insurance was to be effective.

The answer traverses most of the allegations of the complaint and especially the averment of mistake. It charges that the policy was issued on or about November 27, 1914, at which time the chattels were owned by the plaintiff Boardman and one Miller under the firm name and style of Boardman & Miller; that at that time neither Bartle nor the firm of Boardman & Bartle

had any interest therein and that the defendant intended to and did issue and deliver the policy to Boardman & Miller designing only to insure their interests. It then recites that the policy provided that it should be entirely void unless otherwise provided by agreement indorsed thereon or added thereto,

"if the interest of the insured be other than unconditional and sole ownership, or if any change, other than by the death of an insured, take place in the interest, title or possession of the subject of insurance";

that about December 18, 1914, the partnership of Boardman & Miller was dissolved by the defendant Bartle purchasing and succeeding to the ownership of Miller in the insured property; and that no agreement providing for any change in the interest of the insured in or to the property or for any change in the interest, title or possession of the subject of insurance, was ever made by or on behalf of the defendant, or indorsed or added to said policy of insurance.

The reply traverses the new matter in the answer and states in substance that neither the plaintiffs nor Miller ever made any application for insurance, nor did the defendant make any inquiries as to the ownership of the articles insured, but received the premium, well knowing that the plaintiffs were in possession of and owners of them and led the plaintiffs to believe that the property and their interests therein were insured and thereby waived the condition of the policy as to ownership and all objections, rights, and privileges thereunder or arising therefrom. A further defense not necessary to be considered here relates to a garnishment of the defendant company by creditors of Bartle seeking to satisfy their claims out of insurance money due him. The court decreed a reformation of the policy as prayed for by the plaintiffs, together with a recovery from the company of $2,000, the

face of the policy, and ordered that out of it certain sums should be paid to the other defendants in settlement of demands against the firm and Bartle. The company appealed. Reversed. Suit Dismissed.

For appellant there was a brief over the name of *Messrs. Veazie, McCourt & Veazie,* with an oral argument by *Mr. J. Clarence Veazie.*

For respondents there was a brief and an oral argument by *Mr. Wilson T. Hume.*

Mr. Justice Burnett delivered the opinion of the court.

1. The vital question to be determined is whether a mistake has been shown in the framing of the policy within the meaning of the law so as to justify its amendment according to the prayer of the plaintiffs. The precept on the subject of correction of an instrument for a mistake is firmly implanted in the jurisprudence of this state to the effect that the complaint must distinctly allege what the original agreement of the parties was, and point out with clearness and precision wherein there was a misunderstanding; that such mistake was mutual and did not arise from the gross negligence of the plaintiff or that his misconception originated in the fraud of the defendant: *Evarts* v. *Steger,* 5 Or. 147; *Lewis* v. *Lewis,* 5 Or. 169; *Stephens* v. *Murton,* 6 Or. 193; *McCoy* v. *Bayley,* 8 Or. 196; *Foster* v. *Schmeer,* 15 Or. 363 (15 Pac. 626); *Hyland* v. *Hyland,* 19 Or. 51 (23 Pac. 811); *Meier* v. *Kelly,* 20 Or. 86 (25 Pac. 73); *Epstein* v. *State Ins. Co.,* 21 Or. 179 (27 Pac. 1045); *Kleinsorge* v. *Rohse,* 25 Or. 51 (34 Pac. 874); *Osborn* v. *Ketchum,* 25 Or. 352 (35 Pac. 972); *Thornton* v. *Krimbel,* 28 Or. 271 (42 Pac. 995); *Mitchell* v. *Holman,* 30 Or. 280 (47 Pac. 616);

Sellwood v. *Henneman,* 36 Or. 575 (60 Pac. 12); *Stein* v. *Phillips,* 47 Or. 545 (84 Pac. 793); *Bower* v. *Bowser,* 49 Or. 182 (88 Pac. 1104); *Smith* v. *Interior Warehouse Co.,* 51 Or. 578 (94 Pac. 508, 95 Pac. 499); *Howard* v. *Tettelbaum,* 61 Or. 144 (120 Pac. 373); *Suksdorf* v. *Spokane, P. & S. Ry. Co.,* 72 Or. 398 (143 Pac. 1104); *Hyde* v. *Kirkpatrick,* 78 Or. 466 (153 Pac. 41, 488).

2. Having in mind the necessity of alleging and proving, as well, that the mistake was mutual, it is not sufficient to reform an instrument if it is shown that it does not express the intent of one of the parties but does conform to that of the other. In every contract there must be the *aggregatio mentium,* or meeting of minds, of all the contracting persons. This principle would be utterly destroyed if the court should undertake to correct what was a mistake of only one of the participants in the agreement.

It becomes necessary, therefore, to inquire into the evidence in the instant case to determine whether there was a mutual mistake. The property described in the policy consisted of billiard-tables with their equipment and other personalty in a billiard-room and cigar-stand in a building in Portland, Oregon. It was subject to two chattel mortgages held by the defendant Trautman said to have been given to him by Phillip S. Miller and the plaintiff Boardman under the firm name of Boardman & Miller. It had been insured for the benefit of Trautman as mortgagee and the firm of Boardman & Miller as owners by a policy of the defendant company expiring December 18, 1914. The testimony is to the effect that on the evening of December 17, 1914, the plaintiff Bartle and Miller finished negotiations with each other for the sale to the former by the latter of his interest in the property and business. On the following day they executed a written

instrument transferring the title from Miller to Bartle and in payment of the purchase price the latter gave his check of that date which was cashed two or three days afterwards. Mr. Burgard, the agent of the defendant company, who transacted all the business on its behalf, testifies that he wrote up the policy in question November 27, 1914, it being the date thereof, and delivered it to Boardman three or four days later. There is no dispute about the date the policy was actually written. The only witness who testifies for the plaintiffs about its actual delivery was the plaintiff Boardman. Referring to Burgard, counsel for plaintiffs asked Boardman: "When did he give you that policy?" The witness answered: "It was about the 18th of December, I think the 18th." This is a literal quotation of all the testimony for the plaintiffs as to the date of the actual delivery of the policy. The plaintiff Bartle declares that he never saw it until after the fire; that the first he learned that the property was insured was two or three days after he took possession; and that he did not know Burgard.

Opposed to the testimony of Boardman as to the date of delivery is that of Burgard, who says he wrote the policy November 27, 1914, and delivered it three or four days later, as stated. The presumption is that the writing is truly dated: Section 799, subd. 23, L. O. L. In addition to this, Burgard testifies to a conversation he had with Boardman at the time he delivered the policy respecting the renewal of the previous one, which would expire December 18th. The witness says in substance that Boardman at first demurred to renewing it because he had a customer of the place who had solicited the insurance, but upon finding that Burgard's firm was agent for the building

he concluded it would be a good thing to stand in with the agent under the circumstances and accepted the policy and stated that he would put it in the safe and undoubtedly in a few days Mr. Trautman would come and get it. This conversation is not denied by Boardman. Boardman also testifies that he did not read the policy but two or three days later surrendered it to Trautman, the mortgagee, whose interest was protected by it. The detailed account given by Burgard of the interview which took place when the policy was handed to Boardman which the latter does not challenge, contrasted with the bald statement of Boardman to the effect that he thinks it was about the 18th that he received the instrument operates strongly to turn the scale in favor of the defendant company. Boardman further says that two days after the fire, which happened on the night of August 2–3, 1915, Mr. Trautman told him the policy was made in favor of Boardman & Miller instead of Boardman & Bartle; yet there is in the record a letter dated August 7, 1915, addressed to the company notifying it of the fire destroying the property which Boardman with his own hand signed by the firm name of Boardman & Miller. He declares on cross-examination that he knew that the partnership of Boardman & Miller had ceased to exist when he wrote the letter. When he was asked: "You knew at that time all you know now about the circumstances of the issuance of that policy?" he answered, "I didn't know whether it made any difference or not." Burgard says he knew from the former policy that Miller had an interest and that he intended to insure Boardman & Miller. He testifies that the previous policy expired December 18, 1914; that it had not been originally issued to Boardman & Miller but was transferred to them afterwards. As to his intention about

whom he insured the following extract from his testimony on cross-examination is given:

"Q. Whose property did you intend to insure the 18th day of December, the owners or somebody else?
"A. Boardman & Miller.
"Q. You intended to insure, Mr. Burgard, the people who owned the property?
"A. Boardman & Miller, yes, sir.
"Q. You intended to insure the people who owned the property?
"A. Yes, sir.
"Q. If Boardman & Miller didn't own the property you didn't intend to insure the property?
"A. If they didn't own it and we knew they didn't, no, sir.
"Q. How would you learn whether they did or did not?
"A. We naturally would be advised if Mr. Miller sold out.
"Q. Don't you make an inquiry when you issue a new policy, don't you make an inquiry as to who owned the property?
"A. No, sir, not necessary on a renewal.
"Q. This was not a renewal of Boardman & Miller?
"A. Yes, sir.
"Q. You claim there was an assignment to Miller?
"A. Yes, sir.
"Q. Where is that assignment?
"A. On the old policy.
"Q. Where is that old policy?
"A. I don't know whether Mr. Boardman or Mr. Trautman has it, it would be in the hands of some of the interested parties."

There is nothing to contradict Burgard's statement on oath that the policy was written November 27, 1914, which is supported by the presumption above noted that the writing was truly dated. The fact that Boardman signed the notice with the firm name of Boardman & Miller when he knew the actual form of the pol-

icy from Trautman's previous statement to him, impairs the weight of his testimony. He was evidently proceeding at that time on the theory that the instrument was correct and was trying to collect on it as originally written.

If we contemplate the transaction as of the date that the document was actually framed it is plain that neither party to it had either Boardman as a single individual or his new firm in contemplation because that was long before the property changed hands from the old concern to the new. If we judge it as of December 18th, and concede that the paper was not actually delivered to Boardman until that date, still there is nothing in the testimony showing that the defendant or any of its agents knew anything about Bartle or his new firm. It is manifest that when Burgard wrote the policy on November 27th, he had no intention to contract with Bartle because he knew nothing about him. There is no pretense in the testimony that anything occurred to change this situation so far as the company was concerned for Bartle himself says he did not know Burgard and never saw the policy until after the fire. Hence there could not be any mutuality of mistake. The allegation of the complaint to the effect that the defendant company had full knowledge that the plaintiffs were in possession of and claimed to be the owners of the property is utterly without proof to sustain it. Moreover, it is highly probable that if, indeed, the policy was not delivered to Boardman until the 18th, the first day of the existence of the new firm, he would have called the attention of his new partner to the transaction at that time.

3, 4. The probability as a matter of weight of testimony, is that Burgard delivered the policy to Boardman about the first of December while the old firm was

yet in being and before the new one was contemplated by even its members, much less by the defendant. Under such circumstances it is a principle that the testimony as to the real contract intended by the parties must be clear and convincing and that if it is at an equal balance either as to what the agreement was or as to whether the mistake was mutual, the correction desired by the plaintiffs will not be allowed. Even if we impute to Boardman and Burgard equal credibility as witnesses, the scale is at a balance and there is a lack of that clear and convincing evidence demanded by the authorities. But, as we have seen, the testimony of Boardman is weakened by the fact that he treated the policy as having been properly written in the name of the old firm when he notified the company of the fire and signed thereto the name of Boardman & Miller. It is also depreciated by Burgard's narration of the conversation occurring when he delivered the policy to Boardman, which talk the latter does not deny. The element of mutuality in the alleged mistake is not established by even a preponderance of the testimony. Fraud is not imputed to the defendant and it was expressly disclaimed at the argument.

5, 6. Something was said at the hearing about the failure of the company to inquire about the ownership of the property being a waiver of that condition of the policy. Conceding but not deciding that waiver was properly pleaded, yet under such circumstances, the plaintiffs would have a plain, speedy, and adequate remedy at law upon the policy, coupled with an allegation that with the knowledge of all the facts the defendant dispensed with that condition about the title to the chattels. This would defeat a suit in equity under well-known principles. Such precedents as *Allesina* v. *London Ins. Co.*, 45 Or. 441 (76 Pac. 392,

2 Ann. Cas. 284), and *Arthur* v. *Palatine Ins. Co.*, 35 Or. 27, 31 (57 Pac. 62, 76 Am. St. Rep. 450), teaching the doctrine of waiver under such circumstances, were cited in support of the argument on that question on behalf of the plaintiffs. Those cases were decided before the enactment of the standard policy law embodied in Chapter VI, Title XXXIV, L. O. L., as amended by the act of February 23, 1911, Laws 1911, p. 279. As construed by this court in *Oatman* v. *Bankers' Fire Relief Assn.*, 66 Or. 388 (133 Pac. 1183, 134 Pac. 1033), and *Finlon* v. *National Union Fire Ins. Co.*, 65 Or. 493 (132 Pac. 712), the statutory conditions cannot be waived except in the manner provided in the statute itself which must be in writing attached to or upon the face of the policy. The enactment mentioned gives the provisions of the policy the force of law, under penalty, for it is made a misdemeanor for an insurance company, its officers or agents, to deliver a policy of fire insurance on property in the state except as prescribed in this legislation. Both parties to a policy must be held to know the law. The Allesina Case and others like it lose their importance and are not applicable to policies issued since the passage of the law. If the condition as to ownership of the property had been waived it could be evidenced only by writing conforming to the legal requirement, in which event the remedy at law would have been ample were the case properly pleaded. The essence of the present contention, however, is that a mutual mistake happened calling for a reformation of the instrument, but it has not been established. The testimony strongly points to the conclusion that the policy was in effect at the time the property changed hands, true enough for a period yet to begin, as it properly might have been stipulated;

but that owing to the inadvertence of the members of the firm the transfer of the insurance was not effected until it was too late. The result is that the decree of the Circuit Court is reversed and one here entered dismissing the suit. REVERSED. SUIT DISMISSED.

MR. CHIEF JUSTICE MCBRIDE, MR. JUSTICE BENSON and MR. JUSTICE HARRIS concur.

Argued March 29, reversed and remanded April 17, 1917.

HAMILTON *v.* NORTH PAC. S. S. CO.*

(164 Pac. 579.)

Limitation of Actions—Cause Arising in Other State—Ship on High Seas.

1. Under the rule that a state's territorial sovereignty extends to a vessel of the state when it is upon high seas, the vessel being deemed a part of the territory of the state to which it belongs, an action by a resident of the State of Washington for injury on the high seas on a vessel owned by a California corporation, nonresident of Oregon, is governed by Section 26, L. O. L., as to time to sue on actions arising in another state.

Pleading—Allegation of Defendant's Residence—Aider by Complaint.

2. Defendant's answer in action for servant's injury while employed on defendant's steamship, alleging that the steamship referred to "is owned in California," and that defendant "is a California corporation," sufficiently alleged nonresidence at time cause of action arose when aided by allegations of complaint that defendant was a California corporation.

Pleading—Reply—Admission of Defendant's Nonresidence.

3. Plaintiff's reply to defendant's allegation that it was a California corporation, in admitting "that the owner of said steamship resides in the state of California," did not admit nonresidence, but merely admitted the conclusion which the law would draw from the fact that defendant was a foreign corporation.

Corporations—Foreign—Doing Business Within State—Process.

4. A foreign corporation doing business within the state is a resident to such an extent that it is amenable to process of state courts.

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*On what constitutes residence out of the state within the meaning of the statute, see notes in 17 **L. R. A.** 225; 49 **L. R. A. (N. S.)** 309. REPORTER.

Limitation of Actions—Absence from State—Foreign Corporation—"Out of the State."

5. A foreign corporation maintaining an agent within the state is not "out of the state," within meaning of Section 16, L. O. L., providing that, when a cause of action has accrued against any person who shall be "out of the state," such action may be commenced within terms specified after return of such person.

Limitation of Actions—Foreign Corporation—Doing Business Within State—"Resident"—"Nonresident."

6. A foreign corporation is a "nonresident," although doing business within this state within meaning of Section 26, L. O. L., providing that, when actions between nonresidents arising in another state are barred by statute of limitation of such state, no action thereon can be here maintained, such corporation being only a resident of the state incorporating it, the word "resident" not meaning "one found within the jurisdiction."

[As to limitation of actions against foreign corporations, see note in 52 Am. Dec. 256.]

Limitation of Actions—Action for Servant's Injury—Pleading California Statute of Limitations.

7. Where employee, resident of Oregon, sued his employer, a California corporation, for injuries sustained while on the high seas on a steamship owned by employer in California, the employer could plead the one-year California statute of limitations in view of Section 26, L. O. L., providing that, when actions between nonresidents arising in another state are barred by the statute of limitations of such state, no action thereon can be here maintained, and the Oregon two-year statute (Section 8, L. O. L.) did not apply.

From Multnomah: LAWRENCE T. HARRIS, Judge.

Action by H. D. Hamilton against the North Pacific Steamship Company, a corporation. From a judgment in favor of plaintiff, defendant appeals. Reversed and remanded.

Department 1. Statement by MR. JUSTICE MCCAMANT.

This is an action brought to recover damages for a personal injury sustained by plaintiff on June 21, 1912. Plaintiff suffered the injuries complained of while working for the defendant on the steamship "Roanoke" and while the steamship was on the high seas. The pleadings admit that the "Roanoke" at the time in question was owned and operated by the defendant,

and that the defendant is a corporation organized and existing under the laws of the State of California. This action was brought on the twenty-second day of November, 1913, more than one year after plaintiff sustained his injuries. The defendant pleads the statute of limitations of the State of California as a defense, and offered to prove on the trial that under the California Code such an action as this must be brought within one year from the accrual of the cause of action. The offer of proof was excluded by the lower court. The Oregon statute of limitations permits such an action as this to be brought at any time within two years after the accrual of the cause of action: Section 8, L. O. L. A verdict was rendered for plaintiff, on which judgment was entered, and the defendant appeals. REVERSED AND REMANDED.

For appellant there was a brief over the name of *Messrs. Wilbur, Spencer & Beckett,* and *Mr. F. C. Howell,* with an oral argument by *Mr. Howell.*

For respondent there was a brief over the name of *Messrs. Malarkey, Seabrook & Dibble,* with an oral argument by *Mr. Arthur M. Dibble.*

MR. JUSTICE MCCAMANT delivered the opinion of the court.

1. There is but one question presented by this appeal: Did the lower court err in excluding evidence as to the California statute of limitations applicable to this character of litigation? In other words: Does the California statute or the Oregon statute apply for the purpose of fixing the time within which plaintiff was required to bring his action? It is elementary and is conceded by both parties to this appeal that the law of

the forum ordinarily determines the time within which plaintiff must sue. The defendant relies wholly on Section 26, L. O. L., which is as follows:

"When the cause of action has arisen in another state, territory, or country, between non-residents of this state, and by the laws of the state, territory, or country where the cause of action arose, an action cannot be maintained thereon by reason of the lapse of time, no action shall be maintained thereon in this state."

Plaintiff's cause of action arose on board a steamship owned in the State of California.

"The territorial sovereignty of a state extends to a vessel of the state when it is upon the high seas, the vessel being deemed a part of the territory of the state to which it belongs": *International Navigation Co.* v. *Lindstron,* 123 Fed. 475, 476 (60 C. C. A. 649, 650).

To the same effect, see: *Deslions* v. *La Compagnie Generale Transatlantique,* 210 U. S. 95 (52 L. Ed. 973, 28 Sup. Ct. Rep. 664, 680); *Old Dominion Co.* v. *Gilmore,* 207 U. S. 398 (52 L. Ed. 264, 28 Sup. Ct. Rep. 133); *La Bourgogne,* 139 Fed. 433, 438 (71 C. C. A. 489); *The Hamilton,* 146 Fed. 724, 726 (77 C. C. A. 150); *In re Clyde Steamship Co.,* 134 Fed. 95, 993; *The E. B. Ward,* 17 Fed. 456, 459.

This case therefore stands on the same footing as if plaintiff had been injured in the City of San Francisco.

2. It appears that plaintiff is a citizen and resident of the State of Washington. The case therefore falls within the operation of Section 26 of the Code, if it shall be held that the defendant is a nonresident of Oregon within the meaning of this section. The defendant's allegation on the subject of its residence is as follows:

"That the said steamship 'Roanoke' referred to in the complaint and owned by this defendant is owned in

the State of California and not within the State of Oregon, and that the said defendant is a California corporation, and that said steamship is registered in the State of California."

Plaintiff claims that this allegation is insufficient on the ground that it covers the residence of the defendant only at the time when the answer was filed, and that there is no allegation that the defendant was a resident of California when the cause of action arose. In the respect criticised the answer is aided by the allegations of the complaint. It is alleged therein:

"That at all times hereinafter mentioned the defendant, North Pacific Steamship Co., was and now is a corporation duly organized and existing under and by virtue of the laws of the State of California and doing business in the State of Oregon, having an agent or agents at Portland, Oregon.

"That at all times hereinafter mentioned the defendant, North Pacific Steamship Co., was the owner of, and engaged in operating, as a common carrier, that certain steamship known as the Steamship Roanoke."

We think it sufficiently appears from the pleadings that the defendant was a California corporation on the day when plaintiff sustained his injuries, and it could not by any possibility have become an Oregon corporation as the result of anything which has since transpired. If the incorporation of the defendant under the laws of California makes it a nonresident of the State of Oregon within the purview of Section 26, L. O. L., the defendant should have been permitted to prove the California statute of limitations.

3. The defendant contends that the pleadings admit that the defendant is a nonresident, and that for this reason the judgment should be reversed. This contention of the defendant is based upon the following allegation contained in plaintiff's reply:

"The plaintiff admits that the steamer referred to in plaintiff's complaint was registered at the city of San Francisco, California, and *that the owner of said steamer resides in the State of California.*"

The foregoing allegation merely admits the conclusion which the law would draw from the fact that the defendant is a California corporation. Plaintiff contends that although the defendant resides within the State of California, it was also a resident of the State of Oregon at the time when the cause of action arose, as it was doing business in Oregon and maintained an agent at Portland. The allegation of the complaint above quoted, to the effect that the defendant has been doing business in the State of Oregon and has maintained an agent therein, is sustained by the proof. This case therefore presents the interesting legal question as to whether a foreign corporation doing business in Oregon and maintaining an agent therein is to be deemed a nonresident of the state within the meaning of Section 26, L. O. L.

While the briefs are replete with authorities, our attention has been directed by the parties to only two cases arising under facts substantially identical with the case at bar. One of these cases, cited by plaintiff, is *Louisville Co.* v. *Pool,* 72 Miss. 487 (16 South. 753). This was an action brought in Mississippi to recover damages for the killing of plaintiff's stock in the State of Alabama by the defendant's railroad. The defendant relied on the Mississippi statute corresponding to our Section 26. The decision is not in point because the Mississippi statute is wholly unlike the Oregon statute. It is confined in its operation to cases of parties who remove from one state to another, and by its terms excludes from its operation the case of a corpo-

ration doing business in two or more states at the same time. The defendant cites *Northwestern Co.* v. *Lowry,* 14 Ky. Law Rep. 600 (20 S. W. 607). This case turns on a question of laches, and what was said by the court in construing the Kentucky statute corresponding to our Section 26 was not necessary to the decision. Furthermore, the Kentucky legislation is distinguishable from the Oregon statute.

4. It is settled law in this jurisdiction that a foreign corporation doing business in Oregon is to be deemed a resident of Oregon in such sense as that it is amenable to the processes of the Oregon courts, and a personal judgment may be secured against it based on the service of summons in this state: *Aldrich* v. *Anchor Coal Co.,* 24 Or. 32, 35 (32 Pac. 756, 41 Am. St. Rep. 831); *Farrell* v. *Oregon Co.,* 31 Or. 463, 467, 468 (49 Pac. 876). It is believed that these authorities go no further than to hold that a corporation by transacting business in Oregon consents to be found therein for the purpose of service of summons upon it.

5. Section 16, L. O. L., is in part as follows:

"If, when the cause of action shall accrue against any person who shall be out of the state or concealed therein, such action may be commenced within the terms herein respectively limited, after the return of such person into the state, or the time of his concealment."

Within the meaning of this statute it is held that a foreign corporation is not out of the state, provided it maintains an agent therein upon whom service of summons may be made: *Burns* v. *White Swan Co.,* 35 Or. 305, 308 (57 Pac. 637); 3 Cook on Corporations, 7 ed., § 757, pp. 2774, 2775. The authorities announcing this latter principle base their conclusions on the fact that

the reason which induced the legislature to enact Section 16 aforesaid is inapplicable to any party on whom service of summons may be effected within the state at any time.

It is provided by Section 44, L. O. L., that except in certain cases an action shall be commenced and tried in the county in which the defendant resides. In the interpretation of this statute it is held that a foreign corporation is a nonresident and that it may therefore be sued in any county in which service may be secured upon it: *Cunningham* v. *Klamath Lake R. Co.,* 54 Or. 13, 21 (101 Pac. 213, 1099). The same conclusion has been reached by the Idaho court: *Boyer* v. *Northern Pacific Co.,* 8 Idaho, 74 (66 Pac. 826, 70 L. R. A. 691). In determining the situs of its movable personal property for purposes of taxation, a corporation is held to be a resident of the jurisdiction which incorporates it: *Callender Co.* v. *Pomeroy,* 61 Or. 343, 351 (122 Pac. 758). Within the meaning of the bankruptcy statute (Act July 1, 1898, c. 541, 30 Stat. 544), a corporation is a resident of the state under whose laws it is incorporated, and of no other state: *In re Matthews Co.,* 144 Fed. 724, 729. The attachment statutes of a number of the states permit the levy of attachments on the property of nonresidents. Within the meaning of these statutes it has been held that a foreign corporation is a nonresident, even though it is transacting business in the state: *South Carolina Co.* v. *People's Inst.,* 64 Ga. 18, 30. The Missouri court, however, has reached a different conclusion on this question of law: *Farnsworth* v. *Terre Haute Co.,* 29 Mo. 75. The Act of Congress governing the jurisdiction of the federal courts requires that suits in which the jurisdiction is based on diversity of citizenship shall be brought only

in a federal district of which either the plaintiff or the defendant is an inhabitant. Within the meaning of this statute it is held that a corporation is an inhabitant of the state which incorporated it, and of no other state: *Shaw* v. *Quincy Mining Co.,* 145 U. S. 444, 453 (36 L. Ed. 768, 12 Sup. Ct. Rep. 935); *Averill* v. *Southern Co.,* 75 Fed. 736, 740. It has accordingly been held that the Baltimore & Ohio Railroad Co. is not an inhabitant of the State of West Virginia, although it maintains and operates extensive lines of railway therein: *Martin* v. *Baltimore & Ohio R. Co.,* 151 U. S. 673, 676, 684 (38 L. Ed. 311, 14 Sup. Ct. Rep. 533). The federal statutes vest the federal courts with jurisdiction of controversies between citizens and residents of different states. Within the meaning of this legislation, a corporation is deemed to be a resident of the state which incorporates it, and of no other: *Koshland* v. *Insurance Co.,* 31 Or. 205, 217, 218 (49 Pac. 845); *Railroad Co.* v. *Koontz,* 104 U. S. 5, 11, 12 (26 L. Ed. 643); *Myers* v. *Murray,* 43 Fed. 695, 699 (11 L. R. A. 216). The books are full of general statements in line with the authorities last above cited. 1 Cook on Corporations (7 ed.) Section 1, page 3, states the rule as follows:

"The domicile, residence, and citizenship of a corporation are in the state where it is incorporated."

In 1 Thompson on Corporations (7 ed.), Section 490, page 592, we find the following language:

"The first and prime rule is that a corporation is a resident, or has its legal domicile in the state or country by and under whose laws it was organized. As said by one court: 'A corporation can exist only within the sovereignty which created it, although, by comity, it may be allowed to do business in other jurisdictions through its agents. It can have but one

legal residence, and that must be within the state or sovereignty creating it.' The authorities are practically unanimous on this proposition."

In 1 Clark & Marshall on Private Corporations, Section 114, page 352, it is said:

"The settled doctrine is that a corporation, for the purposes for which it may be considered a citizen, resident, or inhabitant, is a citizen, resident, or inhabitant of the country or state by or under whose laws it was created or organized, and that it can not be a citizen, resident, or inhabitant of any other country or state."

6. We think the word "nonresident," found in Section 26, L. O. L., is to be interpreted in the light of the authorities last above referred to.

For most purposes and under most circumstances it is clear that a corporation resides only in the state where it is incorporated. If it transacts business in another state, it is properly held to be a resident of such other state for purposes of legal process. This rule is followed in order to prevent the intolerable injustice of authorizing the transaction of corporate business without the corresponding responsibility of answering within the jurisdiction for corporate contracts and torts. It follows, as a corollary, that a corporation transacting business within the state may plead the statute of limitations. These exceptions to the general rule are apparent rather than real. The word "resident" in these authorities means "one found within the jurisdiction." The word is not used in this sense in Section 26. To sustain plaintiff's contention in this case is to hold that every corporation, held to answer in an Oregon court, is a resident of Oregon, for no foreign corporation can be sued in this state unless it maintains an agent in Oregon: *Aldrich* v. *An-*

chor Coal Co., 24 Or. 32, 35 (32 Pac. 756, 41 Am. St. Rep. 831). Section 26 is the concluding section of the chapter of the Code on the subject of the limitation of actions. The purpose of the legislature in enacting the statute was to remove any possible encouragement which might otherwise be offered for the bringing in the Oregon courts of litigation which more properly belongs elsewhere.

When the cause of action arises in Oregon, the courts of this state are a proper forum in which to litigate the controversy. Inasmuch as the courts of this state exist for the accommodation of its citizens, every opportunity should be given to litigate in our courts controversies to which any citizen of Oregon is a party. Section 26 permits these controversies to be litigated in Oregon courts during the whole period allowed by our statute of limitations. It is the plain legislative intent that controversies arising in other jurisdictions between citizens of other states shall not be litigated in Oregon courts after the causes of action are barred by the statutes of such other states. It is contrary to the policy of the law to encourage the litigation in our courts of controversies which are litigated here for the sole reason that our statute of limitations is more liberal than that of the jurisdiction in which the controversy arose. The word "resident" as used in Section 26 is used in the same sense in which Congress uses it in statutes defining the jurisdiction of the federal courts.

7. Within this definition the defendant is a resident of California; plaintiff is a resident of Washington and the cause of action arose within the jurisdiction of California. The case therefore falls within the operation of Section 26, L. O. L., and the defendant should have

been permitted to prove that the action is barred by the California statute of limitations.

The judgment is reversed and the cause remanded.

REVERSED AND REMANDED.

MR. CHIEF JUSTICE MCBRIDE, MR. JUSTICE BURNETT and MR. JUSTICE BEAN concur.

MR. JUSTICE HARRIS took no part in the consideration of this case.

Argued April 3, reversed and suit dismissed April 24, 1917.

OREGON ART TILE CO. *v.* HEGELE.

(164 Pac. 548.)

Appeal and Error—Assignments of Error.

1. Assignments of error, containing a statement of what was done, plus the complaints made by appellants, are sufficiently specific, definite and certain.

Evidence—Secondary Evidence—Preliminary Proof.

2. Unsworn declarations of counsel of giving of notice to produce writings for use at the trial will not supply the requisite preliminary proof for introduction under Sections 712, 782, L. O. L., of secondary evidence of their contents.

Discovery—Failure to Permit Inspection—Presumption—Preliminary Proof.

3. Unsworn statement of plaintiff's counsel of neglect or refusal of defendants to obey an order to give plaintiff an inspection of a writing is not the requisite preliminary proof to make available the presumption, under Section 533, L. O. L., that the terms of the writing are as alleged by plaintiff.

From Multnomah: GEORGE N. DAVIS, Judge.

Department 2. Statement by MR. JUSTICE HARRIS.

This is a suit to foreclose a claim of lien for labor and material. H. W. Hegele was a doctor and occupied office rooms over a theatre in a building in Portland known as the Empress Theatre Building and

owned by the Empress Theatre Company. Hegele caused the Oregon Art Tile Company, a corporation, to place tiling on the floors and a part way up the partitions of some of the rooms so that they could be used for different kinds of baths employed by Hegele in his practice. Most of the work was done pursuant to a contract which fixed $830 as the price to be paid, but in addition to this the Oregon Art Tile Company performed extra work which the plaintiff claims was reasonably worth $95.75. Hegele paid only $350, and on September 10, 1914, the Oregon Art Tile Company filed a claim of lien for $575.75 on the "Empress Theatre Building constructed upon lots three (3) and four (4) and the east half of lots five (5) and six (6) and the west half of lot six (6), block two hundred and eleven (211)" in Portland.

The complaint in this suit alleges that the Oregon Art Tile Company contracted with H. W. Hegele "for doing the repair and construction work and furnishing the material therefor in and to a certain portion" of the Empress Theatre Building "which said portion is more particularly known and described as the offices of the said H. W. Hegele"; and, further, that "at the special instance and request of the said defendant, H. W. Hegele, during the progress of said work, plaintiff performed extra labor in and upon the said Empress Theatre Building and more particularly in the defendant, H. W. Hegele's, offices within the said building, and furnished extra material not called for in said contract, to be used in and which was used in the alteration, repair and construction of the said offices of defendant, H. W. Hegele, within the said building"; that "the contract price for said alteration, repair and construction work" upon the offices was $830 and that the "reasonable value of said extra material and labor" is $95.75; that no payments

except $350 have been made and that a balance of $575.75 is due; that "on the 10th day of September, 1914, and within sixty days from the completion of the said work, labor and material performed in and upon said Empress Theatre Building" the plaintiff filed a claim of lien, a copy of which was attached to and made a part of the complaint.

The defendants H. W. Hegele and the Empress Theatre Company filed a joint demurrer alleging that the complaint did not state facts sufficient to constitute a cause of suit. The demurrer was overruled and the defendants then filed a joint answer denying "every allegation" of the complaint and averring, as a separate defense, that the labor performed and materials furnished by plaintiff "are of such inferior character and so carelessly and negligently performed that the same were and are worthless, and plaintiff is not entitled to recover compensation therefor."

At the ensuing trial which occurred on October 14, 1915, the defendants declined to offer any evidence, but, when the plaintiff rested, the defendants contented themselves by orally moving for a dismissal of the suit for certain specified reasons. This oral motion was supplemented on October 23, 1915, by a written motion to dismiss which sets forth in detail all the reasons then assigned and now relied upon by the defendants for a dismissal. Subsequently on December 9, 1915, the court signed a judgment "against H. W. Hegele and the Empress Theatre Company" for a specified sum and a decree foreclosing the lien "upon the real property" already described "including the building situated thereon." Both defendants appealed. REVERSED AND SUIT DISMISSED.

For appellants there was a brief over the names of *Messrs. Bronaugh & Bronaugh* and *Mr. Franklin P. Korell,* with an oral argument by *Mr. Korell.*

For respondent there was a brief over the names of *Messrs. Lewis & Lewis* and *Mr. P. E. Newell,* with oral arguments by *Mr. Arthur H. Lewis* and *Mr. Newell.*

MR. JUSTICE HARRIS delivered the opinion of the court.

1. Attention is first directed to the assignments of error. The plaintiff insists that the defendants are precluded from raising some of the questions discussed in their brief for the reason that the assignments are too indefinite and general and because they merely state facts without complaining of any errors.

Assignment No. (1) states that:

"The court erred in allowing witness Finnegan to testify over appellants' objection relative to the contents of a written lease as follows, to wit":

And then follows a transcript of the record showing the question asked, the objection made by defendants, the ruling of the court, and the answer of the witness.

Assignment No. (2) reads thus:

"The court erred in refusing to strike at appellants' request the testimony of witness Finnegan relative to the contents of said lease as follows."

The motion to strike and the reasons assigned for it are then transcribed in full.

Assignment No. (3) recites that:

"The court erred in refusing to dismiss plaintiff's complaint upon motion at the conclusion of plaintiff's testimony."

Assignment No. (4) is general in its terms for it merely states in substance that the court erred in rendering the judgment and decree appealed from.

Rule 11 promulgated by this court (56 Or. 618, 117 Pac. x) requires that the errors relied upon for a reversal or modification of the order, judgment or decree appealed from shall be set out briefly and concisely; and rule 12 provides that no questions will be examined or considered except those going to the jurisdiction of the court, or when the pleading does not state facts sufficient to constitute a cause of action or defense, or those arising upon the assignments of error: 56 Or. 621 (117 Pac. xi).

If all the questions discussed by appellants were predicated upon assignment No. (4) quite a different question would be presented. Most of the points made by the defendants arise out of the first three assignments of error; and each of these assignments contains a statement of what was done plus the complaint made by defendants. Assignments (1) and (2) are far from being indefinite or general; but, on the contrary, they are unusually specific and complete, and if they offend at all it is because they are not brief and concise. Assignment No. (3) arises out of the refusal of the court to allow a motion to dismiss. A particular motion is designated and no doubt can exist as to the motion referred to. Upon examination of the record of the motion it will be ascertained that the defendants not only moved for a dismissal of the suit but they also stated their reasons for the motion. The plaintiff relies upon two Oregon precedents both of which were actions at law and one of them arose out of a former statute, not now in effect, requiring that the assignment of errors be made in the notice of appeal when an appeal was taken from the judg-

ment in an action at law; but if the appeal was from a decree it was not necessary to specify the grounds of error in the notice of appeal: 1 Hill's Ann. Laws (1887), § 537; 1 Hill's Ann. Laws (1892), § 537. Under the terms of that statute when an appeal was taken from a judgment in an action at law it was held that the requirement concerning the specifications of errors was jurisdictional and consequently a failure to follow the statute was disastrous: *Deuch* v. *Seaside Lodge,* 26 Or. 385 (38 Pac. 337); *Wagner* v. *Portland,* 40 Or. 389, 391 (60 Pac. 985, 67 Pac. 300); when, however, the requirement concerning the assignment of errors is based upon a rule of the court instead of a mandatory statute, and when it is not jurisdictional a failure to assign errors in the abstract may be remedied, or as said in *Fleischner* v. *Bank of McMinnville,* 36 Or. 553, 555 (54 Pac. 884, 60 Pac. 603, 61 Pac. 345): "it may, under certain contingencies, be excused entirely." Here, however, there was no failure; but on the contrary, assignments were made and when the assignments are viewed in the light of applicable precedents it will be ascertained that they are sufficiently definite and certain to enable a presentation of all the questions discussed by the defendants: *Krewson & Co.* v. *Purdom,* 13 Or. 563, 570, 571 (11 Pac. 281); *Bridal Veil Lbr. Co.* v. *Johnson,* 25 Or. 105, 106, 107 (34 Pac. 1026); *Medynski* v. *Theiss,* 36 Or. 397, 400 (59 Pac. 871).

The testimony of James B. Finnegan occupies an important place in this appeal. The plaintiff only called two witnesses: J. W. Batcheller, manager of the Oregon Art Tile Company, and James B. Finnegan. The defendants did not offer any evidence and consequently there is no evidence to support the controverted allegations of the complaint, except the testi-

mony of those two witnesses. The record is utterly devoid of any evidence showing that the Empress Theatre Company had actual knowledge of the work done for Hegele, and there is no evidence whatever upon which it can be claimed that the Empress Theatre Company is bound by the acts of Hegele as an agent of the company unless it can be said that the terms of the lease bound the Empress Theatre Company. The importance of the testimony given by Finnegan and objected to by the defendants can be appreciated when it is stated that there is no evidence concerning the terms of the lease, which it is conceded was in writing, except the oral testimony of Finnegan.

Pursuant to the provisions of Section 533, L. O. L., the plaintiff filed a motion on October 9, 1915, "for an order requiring the defendants * * to furnish plaintiff * * an inspection of that certain lease by and between" the defendants; and on the same day the court made an order which, after reciting that one copy of the lease is in the custody of Hegele and another in the charge of the Empress Theatre Company or its attorney W. M. Davis, directs that Hegele shall exhibit his copy of the lease at his office at 11 A. M. on October 11, 1915, so that the plaintiff can inspect the lease and take a copy of it. The order further directs that "W. M. Davis and the Empress Theatre Company show and exhibit to plaintiff its copy" and allow plaintiff to take a copy at 10 A. M. on October 11, 1915.

Immediately upon examining the witness Batcheller, counsel for plaintiff addressing himself to counsel for defendants asked: "Have you at this time the lease between Dr. Hegele and the Empress Theatre Building?" Counsel for defendants responded thus:

"I told you Mr. Newell, at the time that you made this demand on me that the only copy of this lease

that could be found at the time, or that I could give you any information about its location, was in the office of the Empress Theatre Building at Seattle, and that, by the serving of a subpoena on one of its officers here you might be able to get them to bring that down. But I have here this [indicating] which I exhibited to you as a copy of that lease."

Addressing the court, the counsel for plaintiff then stated:

"Having made formal demand and secured an order from the court for the lease existing between Dr. Hegele and the Empress Theatre Company, and having not secured it, we have at this time evidence of a secondary nature to introduce showing the covenants contained in the lease between Dr. Hegele and the Empress Theatre Company."

Upon the conclusion of the last quoted statement James B. Finnegan was called as a witness and permitted to testify that at about the time of the completion of the work done by the plaintiff he had occasion to examine the written lease and that it was shown to him by W. M. Davis. Continuing, the witness testified thus:

"There was one condition in the lease, written in long-hand, the *exact wording* of it I cannot recall, but I remember it very distinctly, which provided that any improvement made by the lessee should be retained and kept by the lessors upon the termination of the lease."

When asked "What was the length of time for the lease to run?" the witness said that he did not "recall the terms of the lease, the period of it nor the consideration."

There is nothing to show whether Hegele refused to exhibit any lease that he may have had at the time and place fixed in the order nor is there any intimation

that W. M. Davis refused to permit an inspection of any copy that he may have had. We infer from the transcript that counsel for the plaintiff called at the office of one of the attorneys for the defendants and was shown "a copy of that lease." This inference, however, is only supported by two statements made by counsel for the defendants supplemented by one statement made to the court by counsel for plaintiff. Counsel for defendants excused a failure to exhibit the original lease by saying that when he exhibited the copy in his office he told counsel for plaintiff that:

"It was an identical copy of the lease itself * * and he expressed a satisfaction with what he saw, and because of the fact that he did express his satisfaction I let it go at that and made no further efforts."

It must be added, however, that counsel for plaintiff stated to the court that he told counsel for the defendants that he was not satisfied. There is no evidence to indicate the date of the occurrence in the office of counsel for the defendants.

2. The question arising out of what occurred at the trial relative to the terms of the lease presents itself in two phases: (1) Whether the testimony of Finnegan was competent secondary evidence; and (2) whether the plaintiff is entitled to avail itself of any presumption concerning the contents of the lease. These two aspects of the question result from Sections 712, 782 and 533, L. O. L., which are here set out.

Section 712: "There shall be no evidence of the contents of a writing, other than the writing itself, except in the following cases:—

"1. When the original is in the possession of the party against whom the evidence is offered, and he withholds it under the circumstances mentioned in Section 782."

Section 782: "The original writing shall be produced and proved except as provided in Section 712. If the writing be in the custody of the adverse party, he must first have reasonable notice to produce it. If he then fail to do so, the contents of the writing may be proved as in case of its loss; but the notice to produce it is not necessary where the writing itself is a notice, or where it has been wrongfully obtained or withheld by the adverse party."

Section 533: "The court or judge thereof, while an action or suit is pending, may order either party to give the other, within a specified time, an inspection and copy, or permission to take a copy of any book, document, or paper in his possession, or under his control, containing evidence or matters relating to the merits of the action or suit, or the defense therein. If obedience to the order be neglected or refused, the court may exclude the book, document, or paper from being given in evidence, or if wanted as evidence by the party applying therefor, may direct the jury to presume it to be such as he alleges it to be; and the court may also punish the party so neglecting or refusing as for a contempt. This section is not to be construed to prevent a party from compelling another to produce books, documents, or papers, when he is examined as a witness."

The penalty imposed for a failure to produce a writing at a trial after reasonable notice is the granting of permission to offer secondary evidence, while a refusal or neglect to obey an order for an inspection and copy gives rise to a presumption. Sections 712 and 782 furnish authority for secondary evidence; but Section 533 goes no further than to authorize a presumption. There is no intimation in the record that any notice contemplated by Section 782 was given; and, furthermore, even if the plaintiff did claim that notice to produce the lease for use at the trial was given under Section 782 the unsworn declarations of

counsel would not supply the requisite preliminary proof: *Reimers* v. *Pierson*, 58 Or. 86, 90 (113 Pac. 436). There are no circumstances bringing the lease within any of the exceptions, whether expressed by the statute or added by judicial construction, dispensing with the necessity of a notice to produce the lease. The evidence given by Finnegan concerning the contents of the lease was incompetent secondary evidence and since his was the only testimony concerning the contents of the lease it necessarily follows that there is a total lack of evidence as to the terms of the lease unless the plaintiff can avail itself of the presumption permitted by Section 533, L. O. L.

3. The plaintiff claims that the terms of the lease make Hegele the agent of the Empress Theatre Company and that the lessor is therefore bound by the acts of the lessee. For the purposes of this discussion we shall assume, without deciding, that notwithstanding the wording of Section 533 the statute applies to suits as well as actions, that the words "may direct" mean "must direct," and that the presumption must be considered by the trier of the facts, whether such trier be a judge or a jury. The presumption permitted by the statute is created only when obedience to the order of the court or judge is "neglected or refused." Before the Oregon Art Tile Company can invoke the aid of any presumption arising out of Section 533, L. O. L., it must first show that the Empress Theatre Company "neglected or refused" to obey the order of the court or judge. The burden rests upon the plaintiff to submit the requisite preliminary proof and as said in *Reimers* v. *Pierson*, 58 Or. 86, 90 (113 Pac. 436), when discussing Section 782, L. O. L., "the unsworn declarations of counsel do not constitute such proof." The plaintiff can of course claim the

benefit of the declarations of counsel for the adverse parties to the extent that such declarations constitute admissions, but there are no admissions in the record which show that the defendants either neglected or refused to obey the order of the court. Counsel for the defendants admitted that he exhibited to counsel for the plaintiff a paper which the former claimed was a copy of the lease. There is nothing in the record except the unsworn contradictory declarations of opposing counsel from which to determine whether the paper was in truth a copy or whether counsel for the plaintiff was or was not satisfied with the paper at the time of the inspection. If the circumstances surrounding the exhibition and inspection of the paper were as declared by counsel for the defendants, the presumption provided for in Section 533, L. O. L., would not be created; but if the circumstances were as declared by counsel for the plaintiff a different result might follow. There is no legal evidence to show that the defendants either neglected or refused obedience to the order for an inspection of the lease, and consequently there is no available presumption that the terms of the lease made Hegele the agent of the Empress Theatre Company as contended by the plaintiff. In brief, there is neither competent evidence of the terms of the lease nor is there competent evidence upon which to base any presumption concerning the provisions of the lease; and consequently there is nothing to show that the Empress Theatre Company had any knowledge of the work done or that Hegele was the actual or constructive agent of the Empress Theatre Company.

Aside from the *ex parte* motion and order for an inspection of a lease and the oral declarations of counsel there is nothing to show that any lease ever existed

or when the lease began or ended. Indeed, for aught that appears from any legal evidence the rooms tiled may not have been among those leased to Hegele.

Although it is not necessary to decide whether the claim of lien was filed within the time required by statute, yet we note in passing that defendant's exhibit 2 is not without significance for under the printed word "completed" is written "6/25–14" indicating that the work was completed on June 25, 1914.

On the record as we find it, the plaintiff is not entitled to enforce its claim of lien. The decree is therefore reversed, the suit is dismissed, and the plaintiff is remitted to an action at law for the recovery of whatever sum may be owing for the work performed.

REVERSED AND SUIT DISMISSED.

MR. JUSTICE BEAN, MR. JUSTICE BENSON and MR. JUSTICE MOORE concur.

Argued April 4, reversed and remanded April 24, 1917.

HAWKINS *v.* ANDERSON & CROWE, INC.*

(164 Pac. 556.)

Death—Actions for Death—Right of Administrator to Sue.

1. Employers' Liability Act (Laws 1911, p. 17), Section 4, provides that, on loss of life by negligence, the widow of the person killed, his lineal heirs or adopted children, or the husband, mother or father, as the case may be, shall have a right of action. Section 380, L. O. L., provides that in case of wrongful death the personal representatives of decedent may maintain an action at law therefor. *Held*, that where an employee, having no kin as named in Section 4 of Employers'

*Authorities discussing the question as to whether personal representative of deceased person is proper party to bring action for death are collated in a note in **L. R. A.** 1916E, 160.

On constitutionality, application and effect of Federal Employers' Liability Act, see notes in 47 **L. R. A. (N. S.)** 38; **L. R. A.** 1915C, 47.

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Liability Act, is killed, though the administrator cannot recover under such section, he can recover under Section 380, L. O. L.

[As to actions for causing death, see note in 70 Am. St. Rep. 669.]

Master and Servant—Employers' Liability Act—When Operative.

2. The Employers' Liability Act is not applicable to cases wherein the rights of the parties are determinable by maritime law.

From Multnomah: GEORGE N. DAVIS, Judge.

Martin W. Hawkins, as administrator of the estate of C. G. Lee Blond, deceased, brought this action against Anderson & Crowe, Inc., a corporation. From a judgment dismissing the action, plaintiff appeals. Reversed and remanded.

Department 2. Statement by MR. JUSTICE BEAN.

This is an action brought by an administrator against the defendant corporation to recover damages for the wrongful death of C. G. Lee Blond, who died from injuries received while in the employ of the defendant and caused by its negligence. A demurrer was interposed to the complaint upon the grounds:

"1st. That the plaintiff has not legal capacity to sue.

"2nd. That the complaint does not state facts sufficient to constitute a cause of action against the defendant."

This demurrer was sustained and a judgment rendered dismissing the action, from which plaintiff appeals.

Omitting some of the formal parts thereof the complaint alleges in substance as follows:

That C. G. Lee Blond died in the City of Portland, Oregon, on or about November 3, 1914, from personal injuries sustained by him while in the employ of the defendant and caused by its negligence as hereinafter set forth; that he left surviving him no widow, no

lineal heirs, no children, no adopted children, no mother and no father; that his heirs were and are J. P. Lee Blond, a brother, Elizabeth M. Rush, a sister, and R. G. Lee Blond, a son of his deceased brother F. C. Lee Blond.

That thereafter and on or about November 4, 1915, Martin W. Hawkins was duly appointed administrator of the estate of the deceased, and ever since has been and now is the qualified and acting administrator.

That on or about October 17, 1914, the deceased, with others, was employed by the defendant to line a sailing vessel named the "Urania"; that it was the duty of the corporation while having such work performed to furnish decedent a reasonably safe place in which to work, reasonably safe instrumentalities and appliances with which to work, and to maintain the same in a reasonably safe condition, all of which it failed to do.

That the ship was constructed with narrow iron beams running lengthwise in the hold thereof and along the sides of the vessel; that what are known as cargo battens were placed between these beams, which battens were supposed to be and are on all ships always bolted or fastened into the hull with iron bolts or nails to hold them permanently and safely in place in order to make the ship strong; that the deceased was ordered by the defendant's foreman to mount the iron beams, use them for the purpose of a scaffold, and to use and hold on to the cargo battens to steady himself and keep himself from falling while performing his duties in lining the ship; that the deceased obeyed this order; that the iron beams were very narrow and about nine feet from the bottom of the ship; that beneath the place where deceased was working there were certain angle irons running crosswise of

the boat at the bottom thereof, which projected above the surface of the floor creating a dangerous situation in case any person should fall and strike against them; that this place was also highly dangerous because of the fact that the cargo battens which deceased was obliged to use and hold on to in doing his work had not been bolted or nailed to hold them permanently or safely in place, or to prevent them from giving way when he took hold thereof to steady himself and keep from falling, "and for the further reason that the hole in said cargo batten through which the bolt is placed to fasten into the side of the ship was too large for the head of the bolt, and said bolt was too small for the hole in said batten to hold said batten fast, firmly and securely in place when it was being used in lining the ship, so that said batten would slide off the bolt when a person was holding on to said batten; all of which facts defendant knew or ought to have known by the exercise of reasonable care and foresight."

That on or about October 17, 1914, while deceased was walking on one of these narrow iron beams and taking hold of one of the cargo battens to perform his work, the latter gave way and slipped off the bolt, causing him to fall with great force and violence a distance of about nine feet to the bottom of the ship, there striking his body against the projecting angle irons, and severely injuring him, from the effects of all of which he died on or about November 3, 1914, to the damage of his estate in the sum of $7,500, without any fault on his part. REVERSED AND REMANDED.

For appellant there was a brief over the names of *Mr. Edward J. Brazell* and *Messrs. Giltner & Sewall,* with an oral argument by *Mr. Brazell.*

For respondent there was a brief over the name of *Messrs. Griffith, Leiter & Allen,* with an oral argument by *Mr. Harrison Allen.*

MR. JUSTICE BEAN delivered the opinion of the court.

It is first submitted by plaintiff that the administrator can maintain the action regardless of whether there are any beneficiaries as described under the 1910 statute. With this contention we are not in accord. There being no relatives of the deceased mentioned in the Employers' Liability Act, General Laws of Oregon for 1911, page 16, adopted by the people in 1910, it is further contended by counsel for plaintiff that the administrator has the right to prosecute the action under Section 380, L. O. L., which provides:

"When the death of a person is caused by the wrongful act or omission of another, the personal representatives of the former may maintain an action at law therefor against the latter, for any injury done by the same act or omission. Such action shall be commenced within two years after the death, and damages therein shall not exceed $7,500.00, and the amount recovered, if any, shall be administered as other personal property of the deceased person."

Counsel for defendant claims that as the facts alleged bring the case within the provisions of the Employers' Liability Act and as there are none of the beneficiaries which are specified in that act, no action can be maintained.

The Employers' Liability Act is entitled "An Act providing for the protection and safety of persons engaged in the construction, repairing, alteration, or other work, upon buildings, bridges, viaducts, tanks, stacks and other structures, or engaged in any work upon or about electrical wires, or conductors, or poles, or supports, or other electrical appliances or contrivances carrying a dangerous current of electricity; or

about any machinery or in any dangerous occupation and extending and defining the liability of employers in any or all acts of negligence, or for injury or death of their employees, and defining who are the agents of the employer, and declaring what shall not be a defense in actions by employees against employers, and prescribing a penalty for a violation of the law."

Section 4 thereof directs:

"If there shall be any loss of life by reason of the neglects or failures or violations of the provisions of this act by any owner, contractor, or subcontractor, or any person liable under the provisions of this act, the widow of the person so killed, his lineal heirs or adopted children, or the husband, mother, or father, as the case may be, shall have a right of action without any limit as to the amount of damages which may be awarded."

As its title indicates the purpose of the act appears to have been to extend the liability of employers and curtail the defenses that were accorded to them previously. It does not seem to have been the contemplation of the lawmaker to take away the right of recovery already conferred by Section 380, in cases where the act does not apply. It is now settled that there can be but one recovery in such a case. A judgment under the enactment of 1910 in favor of the widow of the person killed is a bar to another action in favor of the other relatives named, and a recovery by either of the beneficiaries named therein would preclude a recovery under Section 380, L. O. L. The latter section has not been abrogated by the enactment of the Employers' Liability Act: 2 Labatt on Master and Servant (1 ed.), § 664; 1 Dresser on Employers' Liability, § 2, p. 20; *Staats* v. *Twohy Bros.*, 61 Or. 603 (123 Pac. 909).

While the question involved is presented as a new one the principle which governs was raised in a different manner and adjudicated in the case of *Niemi* v. *Stanley Smith Lbr. Co.*, 77 Or. 227 (147 Pac. 532, 149 Pac. 1033). At page 235 of 77 Or. (page 1035 of 149 Pac.) of the opinion Mr. Justice BENSON said:

"While there is scant authority upon the question as to whether or not the administrator can maintain the action in the event of a failure of all the beneficiaries named in the Employers' Liability Act, we conclude that the better view is well expressed in the case of *Pittsburgh, Ft. Wayne & Chicago Ry. Co.* v. *Vining's Admr.*, 27 Ind. 518 (92 Am. Dec. 269), in which the court says: 'So, also, although by the provisions of Section 27 (2 Gav. & H. St. 1862, p. 56) the action for the death of a child must be brought by the father, or in case of his death, or desertion of his family, or imprisonment, by the mother, or by the guardian for his ward, it seems clear to us that, where there was neither father, mother, nor guardian, the case, not being specially provided for, would then come within the provisions of Section 784 (page 330), and the administrator would be the proper person to sue.'"

It will be noticed that it is plainly alleged in the complaint that there are none of the beneficiaries named in the Employers' Liability Act. It is therefore only necessary to add to the Niemi Case, that in the event of the wrongful death of an employee caused by the negligence of an employer engaged in a hazardous occupation, where the deceased leaves surviving him none of the beneficiaries named in the statute mentioned, and where the facts alleged constitute a cause of action for negligence independent of the liability law, then the executor or administrator can maintain an action for damages for such wrongful death under Section 380, L. O. L. Such a case should

be tried as though the Employers' Liability Act had never been passed, and not under the latter statute: *Staats* v. *Twohy Bros.*, 61 Or. 603 (123 Pac. 909); *McDaniel* v. *Lebanon Lumber Co.*, 71 Or. 15 (140 Pac. 990); *McClaugherty* v. *Rogue Riv. Elec. Co.*, 73 Or. 135 (140 Pac. 64, 144 Pac. 569); *Niemi* v. *Stanley Smith Lumber Co.*, 77 Or. 227 (147 Pac. 532, 149 Pac. 1033); *Bowes* v. *Boston*, 155 Mass. 344 (29 N. E. 633, 15 L. R. A. 365); *Williams* v. *South etc. Ry. Co.*, 91 Ala. 635 (9 South. 77); *Colorado Milling Co.* v. *Mitchell*, 26 Colo. 284 (58 Pac. 28); *Chiara* v. *Stewart Mining Co.*, 24 Idaho, 473 (135 Pac. 245); *Hawkins* v. *Barber Asphalt Co.* (D. C.), 202 Fed. 341.

2. While some of the complaint as worded indicates that it was the intention of the pleader to bring the case within the terms of the Employers' Liability Act, and also that if there were any of the beneficiaries named therein to bring the action they would have a right to do so, nevertheless it seems that a case of negligence is alleged independent of the Employers' Liability Act of 1910. It may be that the rights of the parties are to be determined by the maritime law: *Schuede* v. *Zenith Steamship Co.* (D. C.), 216 Fed. 566. If so, the provisions of the Employers' Liability Law, relied on by the defendant as the basis of its demurrer, are certainly not applicable.

It follows that the judgment of the Circuit Court sustaining the demurrer and dismissing the action must be reversed and the cause remanded for such further proceedings as may be deemed proper not inconsistent herewith. It is so ordered.

REVERSED AND REMANDED.

MR. CHIEF JUSTICE MCBRIDE, MR. JUSTICE MOORE and MR. JUSTICE MCCAMANT concur.

Submitted on brief for appellants April 11, reversed with directions April 17, 1917.

IN RE RYAN'S ESTATE.

(164 Pac. 586.)

Courts—Appeal from County Court to Circuit Court—Time for Filing Transcript.

1. Section 554, L. O. L., requiring filing of transcript within 30 days after perfecting appeal, is mandatory, and, on appeal from the County to the Circuit Court, all opportunity to confer jurisdiction upon the Circuit Court passes with the lapse of this 30 days without any extension of time granted before its end.

Courts—Time of Appeal—County Court to Circuit Court—Nunc Pro Tunc Order.

2. Where on appeal from County to Circuit Court transcript is not filed, as required by Section 554, L. O. L., within 30 days from perfecting appeal, the Circuit Court has no power to order that the transcript be filed as of a date within the expired 30 days; the sole purpose of *nunc pro tunc* order being to make the record speak the truth, never to falsify it.

Courts—Appeal from County Court to Circuit Court—Vacation of Judgment.

3. An appeal from the County to the Circuit Court having been dismissed for failure to file transcript in time, the Circuit Court could not at a subsequent term, without showing of appellant's mistake, inadvertence or excusable neglect, reinstate the cause for trial, for no court has appellate jurisdiction over its own decrees, and after the term at which a decree is entered the court's power over the decree is restricted to making the record conform to the actual truth of what was done at term time.

From Multnomah: HENRY E. MCGINN, Judge.

This appeal involves certain proceedings in the matter of the estate of James Ryan, deceased. From an order of the County Court fixing the fees of the executor and his attorney, the executor appeals to the Circuit Court. The devisees appeal from the judgment rendered in the Circuit Court in favor of the executor. Reversed and cause remanded with directions.

In Banc. Statement by MR. JUSTICE BURNETT.

The chronology of this proceeding is as follows: June 27, 1911, an order of the County Court of Mult-

nomah County was entered in the matter of the estate of James Ryan, deceased, fixing the fees of the executor and of his attorney. On the thirteenth of the same month the executor served his notice of appeal and filed the same with the acceptance thereof with the clerk of the court two days later. His undertaking on appeal was served and filed ten days thereafter. The exceptions to his sureties were overruled on August 2, 1911. The next event was an *ex parte* order in the matter by one of the judges of the Circuit Court of Multnomah County, Oregon, made on July 22, 1912, allowing the transcript on appeal to the Circuit Court to be filed as on August 29, 1911. A motion of April 1, 1914, to dismiss the appeal on the ground that the transcript was not filed within the time required by law was sustained on July 15 of that year. On October 28, 1915, the executor moved the Circuit Court to cancel the order dismissing the appeal on the ground that the same was entered through the mistake, inadvertence or excusable neglect of his counsel. No showing, by affidavit or otherwise, appears in the record supporting this motion, but on March 31, 1916, the Circuit Court vacated the order dismissing the appeal and reinstated the cause upon the docket to be tried upon its merits. When it came on for hearing on April 6, 1916, the residuary legatees and devisees objected to the trial of the cause for several reasons, among others, because the court never acquired jurisdiction thereof, and because the attempted appeal had been dismissed. The objection was overruled and the case proceeded to trial and judgment in favor of the executor, for an increased amount on account of attorneys' fees. The devisees appeal.

REVERSED AND REMANDED WITH DIRECTIONS.

For appellants there was a brief over the name of *Messrs. Emmons & Webster.*

No appearance *contra.*

MR. JUSTICE BURNETT delivered the opinion of the court.

Within ten days from service of notice of the appeal the appellant must serve and file his undertaking on appeal with the clerk of the court. Within five days thereafter exceptions to the sufficiency of the sureties must be filed or be considered waived. The appeal is deemed effective from the expiration of the time allowed for exceptions to the sureties or the overruling of such objections: Section 550, L. O. L.

1, 2. We find the following in Section 554, L. O. L.:

"Upon the appeal being perfected, the appellants shall within thirty days thereafter file with the clerk of the appellate court a transcript or such an abstract as the rules of the appellate court may require, of so much of the record as may be necessary to intelligibly present the questions to be decided by the appellate tribunal, together with a copy of the judgment or decree appealed from, the notice of appeal and proof of service thereof, and of the undertaking on appeal; and thereafter the appellate court shall have jurisdiction of the cause, but not otherwise. * * "

It will be noted that the appeal became perfect on August 2, 1911, the date when the exceptions to the sufficiency of the sureties were denied. In order to confer jurisdiction upon the Circuit Court, the transcript should have been filed within thirty days thereafter, as required by Section 554, L. O. L., or at least by September 1 of that year. With the lapse of this thirty days without any extension of time granted before its end passed all opportunity to confer jurisdiction upon

the Circuit Court. The order of July 22, 1912, directing that the transcript be filed as of a date in the previous year, was utterly void and of no effect. It was in the nature of an order *nunc pro tunc,* concerning which Mr. Justice Bean very pithily said in *Grover* v. *Hawthorne,* 62 Or. 75 (116 Pac. 100):

"When a judgment has been actually rendered or an order made by the court which is entitled to be entered of record, but, owing to the misprision of the clerk, has not been so entered, the court may order the entry to be made *nunc pro tunc.* But it is not the function of the court to create an order now, which ought to have been passed at a former time. In ordering an entry made *nunc pro tunc,* not one jot or tittle should be added to or taken from the original judgment."

3. If it was not true that the transcript was filed within thirty days after perfection of the appeal, no order of the court can make it true. The sole purpose of a *nunc pro tunc* order is to make the record speak the truth, never to falsify it. Still further, after having dismissed the appeal on July 13, 1914, the term at which it was made having lapsed, and there being no showing in the matter of mistake, inadvertence, or excusable neglect on the part of the appellant or of his counsel, the court could not rightly make the order of March 31, 1916, reinstating the cause for trial. During the term at which it was rendered a court of record may change its judgment under proper circumstances not disclosed here; but beyond the term, there is no sanction for anything more than to make the record conform to the actual truth of what was done at term time. No court has appellate jurisdiction over its own decrees.

This court has very often held that a failure to file the transcript within the time provided by law or

within an enlargement thereof by an order made before the expiration of the legal period will prevent the jurisdiction of the court from attaching. Citation of the precedents would be platitudinous. The statute is plain and mandatory beyond the need of construction when it says the transcript must be filed within thirty days after the perfection of the appeal "and thereafter the appellate court shall have jurisdiction of the cause, but not otherwise."

The Circuit Court was utterly without jurisdiction to hear the cause on appeal. Its judgment is therefore void and must be set aside and held for naught. The cause is remanded with directions to the Circuit Court to dismiss the appeal from the decree of the County Court.

REVERSED AND REMANDED WITH DIRECTIONS.

Argued April 12, reversed and remanded April 24, 1917.

POULLOS *v.* GROVE.*

(164 Pac. 562.)

Master and Servant—Negligence—Injuries to Servant—Employers' Liability Act—Contributory Negligence.

1. In a servant's action for injuries, a complaint, alleging that defendant employed plaintiff as a farm laborer and directed him to go to the second story of a barn for the purpose of assisting in throwing down hay, negligently failing to warn him that there was a hole in the floor of the second story or to guard such hole, and that owing to darkness and insufficiency of lantern light the plaintiff fell through such hole and was injured, stated a cause of action within the purview of the Employers' Liability Act (Laws 1911, p. 16); and hence, under the direct provisions of Section 6 of the act, contributory negligence of plaintiff was not a defense, but could only be taken into account by the jury in fixing the amount of damages.

*On the question of abrogation of defense of contributory negligence by Federal Employers' Liability Act, see notes in 47 L. R. A. (N. S.) 61; 48 L. R. A. (N. S.) 987; L. R. A. 1915C, 65. REPORTER.

Master and Servant—Injuries to Servant—Employers' Liability Act—Question for Jury.

2. The question whether plaintiff's employment was one of risk or danger, and hence under the Employers' Liability Act, which involves the consideration of the conditions under which the work was to be performed as well as the class of employment, *held* for the jury under proper instructions.

Master and Servant—Injury to Servant—Employers' Liability Act—Sufficiency of Evidence.

3. Evidence *held* sufficient to go to the jury on the hypothesis that plaintiff was in the loft pursuant to the direction of the defendant, that he was ignorant of the hole, and that he could not see it owing to the darkness and insufficiency of the lantern light.

[As to what statutes are impliedly repealed by State Employers' Liability Act, see note in Ann. Cas. 1916E, 773.]

From Linn: PERCY R. KELLY, Judge.

This is an action by William Poullos against R. M. Grove. Judgment for defendant and plaintiff appeals. Reversed and remanded for further proceedings.

Department 1. Statement by MR. JUSTICE BURNETT.

In substance it appears from the complaint that at the dates mentioned therein the defendant owned and operated a farm in Linn County, Oregon, upon which was situated a two-story barn. About fifteen feet above the first floor was the second story, where the hay used for feeding the stock was stored and it was necessary for those engaged in that work to go there and pitch it down to the racks and mangers below. About March 18, 1915, the defendant employed the plaintiff to do general farm work for him, among other things to assist in feeding the horses, milking the cows, and the like. The plaintiff's initiatory pleading proceeds then as follows:

"That on or about March 31, 1915, and while plaintiff was employed by defendant and pursuant to such employment and about eight o'clock in the evening of said day, defendant directed plaintiff to ascend to the said second story in said barn for the purpose of assisting in throwing hay down from said loft in said barn to the racks and mangers of the horses for the purpose

of feeding said horses, and to go upon the hay in said second story at and near that certain hole and pitfall hereinafter mentioned; that prior to said time plaintiff had not been in the loft and second story of said barn and was not familiar with the conditions that obtained therein and did not know of the existence of that certain hole and pitfall hereinafter mentioned; that at said time the entire second story and hay loft in said barn was enveloped in darkness and plaintiff was unable to see the conditions existing in said second story and in said barn and did not see and could not see said hole and pitfall and that the same was concealed and invisible; that at said time and at all times herein alleged it became and was the duty of defendant to provide plaintiff a safe place in which to perform said service and work, and to warn plaintiff of the dangers incident to the performance thereof, and to warn plaintiff of the perils and dangers existing on the premises and on said second story of said barn and of the existence of the hole and pitfall hereinafter mentioned; that in violation of his said duty defendant negligently and carelessly caused and suffered a certain hole and pitfall some six feet square in dimensions to extend through the hay and second story of said building at and near the place where plaintiff and others feeding said stock were required to work and remain while feeding said stock, and thereby rendered said place dangerous to the life and person of plaintiff and others working therewith, and negligently and carelessly failed and omitted to place any guard or guards around said hole and pitfall and negligently and carelessly failed and omitted to warn plaintiff of the presence and existence of said pitfall and negligently and carelessly requested and directed plaintiff to go upon said hay and second story and over and across same where said pitfall existed; that at said time plaintiff had no knowledge of said pitfall or the dangers and perils incident to going upon said hay; that at all times herein alleged it was and is practicable to provide good and sufficient guards in the way of walls, boards and lights that would have warned plaintiff of the existence of said hole and pitfall and pre-

vented plaintiff from falling therein; that in compliance with the commands and requests of defendant and in the course of his employment plaintiff ascended the second story as directed by defendant for the purpose of feeding said stock; that while in the performance of said duty and without fault upon the part of plaintiff and solely by reason of the negligence of defendant as hereinabove alleged, plaintiff fell with great force and violence through said hole and pitfall down from the said second story in said building to the floor on the first story of said building some fifteen feet distant below, thereby breaking the bone in plaintiff's left thigh and hip and lacerating and bruising the muscles, nerves and skin of plaintiff's left arm, left side and left leg, and causing plaintiff's left leg and hip to permanently remain stiff and weak and shortened."

The remainder of the complaint relates to the age and condition of the plaintiff, his earning capacity, and his damage both general and special, concluding with a demand for judgment.

The answer denies all the allegations of the complaint except the ownership of the farm and barn thereon, and the fact, as the answer contends, that the plaintiff injured himself. The affirmative defense is to the effect that the plaintiff went into the barn loft without any direction of the defendant and without any reason for his being there; that whatever injury he received was because of his own carelessness and negligence in not observing the hole through which he fell.

This in turn was traversed by the reply. The assignments of error relate to the giving of certain instructions by the court. From a judgment in favor of the defendant the plaintiff appeals.

REVERSED AND REMANDED.

For appellant there was a brief over the name of *Messrs. Weatherford & Weatherford*, with an oral argument by *Mr. Mark V. Weatherford.*

For respondent there was a brief over the name of *Messrs. Hill & Marks,* with an oral argument by *Mr. Gale S. Hill.*

MR. JUSTICE BURNETT delivered the opinion of the court.

There is testimony on behalf of the plaintiff to the effect that he applied to the defendant for employment; that the latter told him there was not much to do, but that if he needed work he would employ him, paying him whatever was right and that after a while when there was more to do he would recompense him with money; and further, that for several days he worked about the farm cutting and burning brush, helping to pick up lambs, and milking. Relating to the mishap in question, he testifies that in the evening when supper was over and after dark the defendant's son remarked that it was time to go and feed the horses, whereupon the defendant, to quote the witness, said:

"Well, he says to me, 'You had better go with him and help him to do that, too; he will show you where the hay is, and you will know yourself next time,' and I told him, 'All right.'

"Q. What did you do?

"A. His son stepped out of doors and got the lantern, and lighted the lantern, and started for the barn, and I was following him.

"Q. Had you ever been in the second story of that barn before?

"A. No. * *

"Q. And after you got to the barn, where did you go?

"A. We started to go upstairs, up to the upper deck.

"Q. And how were you traveling?

"A. I was keeping following him, always right behind him.

"Q. And what was the condition, so far as you could see the floor, upstairs?

"A. Couldn't see anything else; just keeping following his tracks. It was too dark, and I couldn't see nothing else, and following him and following the signs of the light against the other wall of the barn.

"Q. And what happened?

"A. After I walked about probably four or five feet, something like that, then I fell through, fell all at once; I don't know how I fell, but I hit the second floor; I hit the floor, and I was laying there, I don't know how long I was laying there; and when I come up to myself I seen Mr. Grove's son standing beside me with the lantern on his hand."

The plaintiff's further testimony was to the effect that his hip was broken and relates to his subsequent sufferings. It is undisputed that in the second floor over the driveway leading through the barn was a hole six by eleven feet in the clear. The stairway leading up to the hay loft ended twenty-six inches from one corner of the large hole. The plaintiff testified in substance that on the occasion mentioned the defendant's son preceded him and going up to the loft, passed near the big hole to the west end thereof, turned across and hung his lantern on a post near the southwest corner of the hole; and that the plaintiff following him during this time fell through the hole to the floor below.

1. The court in various forms instructed the jury that if the plaintiff by his own negligence contributed to the injury he could not recover at all. For instance, when the jury returned for further instructions, the court said to them:

"If both parties were negligent and the negligence of each contributed directly to the injury, the plaintiff cannot recover. That is the doctrine of contributory negligence."

We have in this case a pleading sufficient to disclose an employment of the plaintiff by the defendant. It

states enough to show that, in the manner in which it was to be accomplished, the work at which he was set involved a risk and danger to the employee performing the same.

It is said in what is known as the Employers' Liability Act:

"And generally, all owners, contractors or subcontractors and other persons having charge of, or responsible for, any work involving a risk or danger to the employees or the public, shall use every device, care and precaution which it is practicable to use for the protection and safety of life and limb, limited only by the necessity for preserving the efficiency of the structure, machine or other apparatus or device, and without regard to the additional cost of suitable material or safety appliance and devices."

We have decided in effect on numerous occasions that this language enlarges rather than restricts the particular words used in the first part of the section, from which the excerpt is taken. For instance, in *Yovovich* v. *Falls City Lumber Co.*, 76 Or. 585 (149 Pac. 941), we applied it to a case where the plaintiff's decedent was killed by the release of a tree which had been bent over by another fallen tree from which he had cut a saw log. The statute was held applicable in *Marks* v. *Columbia County Lumber Co.*, 77 Or. 22 (149 Pac. 1041, Ann. Cas. 1917A, 306), where the plaintiff was injured by the action of a fractious horse which he was using to haul lumber for the defendant. In *Dorn* v. *Clarke-Woodward Drug Co.*, 65 Or. 516 (133 Pac. 351), the work involved was the installation of a transom in the wall of an office requiring the use of a ladder which slipped and allowed the plaintiff to fall upon the floor whereby he received the injuries of which he complained. The enactment was applied there. It governed the case of *Schaller* v. *Pacific Brick*

Co., 70 Or. 557 (139 Pac. 913), where the plaintiff was injured in working about a pressed brick machine. It ruled in *Heiser* v. *Shasta Water Co.*, 71 Or. 566 (143 Pac. 917), in which the injury was the result of an explosion of a syphon bottle filled with carbonated water. We decided for the plaintiff under the act in *Mackay* v. *Commission of Port of Toledo*, 77 Or. 611 (152 Pac. 250), where, owing to a defect in a ladder, it slipped upon the deck of a dredger on which the plaintiff was at work for the defendant whereby he was thrown to the floor and injured. A fair construction of the complaint in this instance makes out a cause of action within the purview of the legislation mentioned.

The instructions of the court excluded the plaintiff from recovery if it should appear that his own negligence contributed in any degree to the injury which he claims he suffered. Section 6 of the statute, however, says:

"The contributory negligence of the person injured shall not be a defense, but may be taken into account by the jury in fixing the amount of the damage."

In other words, the enactment does away with the old rule of requiring the employee to carry the whole risk of the employment and to fail of recovery if his own neglect contributed in any way to the injury of which he complains. The new legislation on the contrary allows contributory negligence to be used only to mitigate the actual damages and measure them out between the parties in proportion as the fault of each of them contributed to the injury happening to the plaintiff.

2. As a matter of law we cannot classify the infinite variety of employments and say that some of them are works involving risk or danger and that others are not.

As stated by Mr. Justice BENSON in *Mackay* v. *Commission of Port of Toledo*, 77 Or. 611 (152 Pac. 250):

"The question as to whether or not the work involved a risk or danger is one of fact, to be determined by the jury, rather than a question of law."

Each case must depend greatly on the attendant circumstances. The conditions under which the work was to be performed must be considered as well as the class of employment. All such things affect the question of whether the task involves risk or danger, and this must be left to the jury under proper instructions.

3. To entirely exclude the plaintiff from recovery if his heedlessness in any way contributed to the injury would be to deprive him of the benefit of the Employers' Liability Act and utterly to ignore the theory of the case as framed by his complaint. We have a case of employment where the defendant was the owner of the barn in which the accident occurred. Confessedly, the opening in the floor was without any guard or obstacle to prevent anyone from falling through it. There was enough testimony to go to the jury on the hypothesis that the plaintiff was in the loft in pursuance of the direction of the defendant; that he was ignorant of the existence of the hole, and that he could not see it owing to the darkness and insufficiency of the lantern light. He was entitled to have his case submitted to the jury as he stated it; but by visiting upon him the whole consequence of his carelessness, if any, the court deprived the jury of the right to consider the plaintiff's grievance as pleaded. The result is that the judgment must be reversed and the cause remanded for further proceedings. REVERSED AND REMANDED.

MR. CHIEF JUSTICE MCBRIDE, MR. JUSTICE HARRIS and MR. JUSTICE MCCAMANT concur.

Argued April 5, affirmed April 24, 1917.

MARYLAND CASUALTY CO. *v.* KLABER'S ESTATE.

(164 Pac. 574.)

Appeal and Error—Review—Findings.

1. On appeal in a proceeding at law, the findings of the trial court as to the facts are conclusive.

Statutes—Construction—Adoption of Statute.

2. When a statute of another state is adopted and enacted, it must be deemed to have been passed subject to the interpretation given it by the courts of the state of its origin.

Trusts—Bond of Trustee—Relief from Liability—Showing of Misconduct—Statute.

3. Under Section 685, L. O. L., providing that a surety upon the bond of any executor or other fiduciary may apply by petition to the court wherein the bond is directed to be filed, etc., praying to be relieved from further liability as surety, etc., the surety on the bond of trustees under a will was not entitled to be relieved of further liability upon its arbitrary demand to be relieved, without showing any fault, dereliction or misconduct on the part of its principals.

[As to discharge of surety for causes existing prior to his entering upon contract of suretyship, see note in 63 **Am. St. Rep.** 327.]

From Multnomah: T. E. J. DUFFY, Judge.

This proceeding was initiated by petition of the Maryland Casualty Company, a corporation, against the estate of Herman Klaber, deceased, Max Wolf and Herman A. Kaufman, as trustees, to be relieved from a surety bond. From a judgment denying the application, petitioner appeals. Affirmed.

Department 2. Statement by MR. CHIEF JUSTICE MCBRIDE.

This was a proceeding by plaintiff to be relieved from a surety bond given by it to secure the faithful performance of the duties of the trustees of Bernice Janet Klaber under the will of Herman Klaber, deceased. Herman Klaber died testate bequeathing the

sum of $100,000 to his daughter, Bernice Janet, and directing that his executors, Max Wolf and H. A. Kaufman, manage and invest such sum and pay it over to her upon her attaining the age of twenty-one years. The estate was probated and closed, and the probate court made an order turning over the amount bequeathed, less $950 inheritance tax, to the trustees named in the will upon their filing a bond in the sum of $99,050. The *cestui que trust* was then four years of age and the undertaking had seventeen years to run. The petitioner was the surety and the bond was in the usual form, being executed and filed in the probate court June 26, 1914. In the month of February, 1915, the plaintiff filed in the probate court a petition demanding to be discharged from liability on its bond and requesting the court to require the trustees to bring the estate in their hands into court and to settle an account showing their doings therein up to the time of such hearing. It also presented a notice reciting the fact that the money had been turned over to the trustees, and that the petitioner was surety on the bond given by them for the faithful discharge of their trust; that it was the understanding at the time such bond was given that the trust fund should be held under the joint control of the surety and the trustees; that the money had not yet been invested, but was in possession of one of the trustees and not subject to the joint control of the two nor of the petitioner. The petition stated on information and belief that it was the intention of the trustees to loan the trust funds to a corporation known as the Klaber Investment Company, in Lewis County, Washington, which company is engaged in the hop business; that the petitioner does not consider that a loan of this character is a proper investment of trust funds, and desires to have a settlement of accounts up to the

present time and to be released from further liability, and that the trustees be cited to appear and show cause why it should not be released from further liability on said bond.

The trustees being cited, appeared and answered denying that there was ever any understanding with petitioner that the fund should be under joint control of themselves, and further denied that the money was not yet invested, or that it was in possession of one of the trustees; and alleged that petitioner's agent solicited from the trustees the writing of said bond and that it was executed solely upon the understanding and agreement that the trustees would pay the premium demanded by petitioner and not otherwise; that the home office of the petitioner became dissatisfied with the writing of said bond because it would continue for such a long period of time; that in order to relieve petitioner from anxiety in respect to the investment of said fund the trustees offered to invest it substantially as alleged in the petition, loaning $50,000 to the Klaber Investment Company, a corporation organized by Herman Klaber in his lifetime and substantially controlled by him, being at present owned by his widow. Said corporation having real and personal assets valued at from $175,000 to $200,000, and there being no liabilities except for current bills and ordinary expenses, other than a mortgage for $10,000 against which is an equal amount of cash on hand, the trustees offered to invest the remainder of said funds in a safe and conservative manner by the purchase of bonds or other securities satisfactory to the petitioner and to hold the same subject to joint control; that negotiations have been constantly going on between the trustees and plaintiff in respect to the matter, but no accommodation has been reached; that there has been no change in the

status of the parties or in the condition of the trust fund, and no impairment of the security thereof since the bond was executed.

Upon the trial the court made the following findings and conclusions:

"1. There has been no dereliction of duty on the part of the trustees of said Bernice Janet Klaber fund and no danger has been shown to the funds or property in the hands of the trustees, nor has there been any allegation in the petition of the surety company in which it seeks to be relieved from its obligation as surety that there was at any time a dereliction of duty on the part of the trustees or that the funds or property in the hands of the trustees were in any wise endangered.

"2. The testimony shows that the trustees are financially responsible and that the funds in their hands are safely and fully protected.

"3. There is no allegation in the petition of the surety company that it was induced by fraud or any improper representation to execute the bond, and no testimony has been offered tending to prove any such fraud or misrepresentation, but on the contrary the testimony establishes the fact that the bond was executed upon the solicitation of the surety company and its duly accredited agents.

"4. No valid reason has been shown in the pleadings or by the testimony to justify the application of the surety company for release from the obligation assumed by it in executing the said bond."

As conclusions of law the court finds:

"1. That the appeal taken by the surety company from the judgment and order of the county court was properly taken and that the appeal therefrom will lie from the county court to this court.

"2. That the appeal in this proceeding is in the nature of an appeal from the decree in an equitable proceeding.

"3. That the petitioner, the Maryland Casualty Company, has not shown itself entitled to the relief it seeks

and there is no valid ground upon which said surety company can be relieved from its obligation as surety on the bond of the trustees of the Bernice Janet Klaber fund.

"4. That the trustees are entitled to a judgment according to these findings and to recover its costs and disbursements herein."

Upon these findings there was a judgment denying the application, from which petitioner appeals.

Affirmed.

For appellant there was a brief over the names of *Mr. F. C. Howell* and *Messrs. Wilbur, Spencer & Beckett,* with an oral argument by *Mr. Howell.*

For respondent there was a brief over the firm name of *Messrs. Dolph, Mallory, Simon & Gearin,* with an oral argument by *Mr. Joseph Simon.*

Opinion by Mr. Chief Justice McBride.

1. If according to plaintiff's contention, this application is to be treated as a proceeding at law, the findings of the court are conclusive here as to the facts. There remains but one question: Can the surety upon a bond of this character be relieved of further liability thereon upon his arbitrary demand to be so released and without showing any fault, dereliction or misconduct on the part of his principal? The decision of this matter hinges upon the construction of Section 685, L. O. L., which reads as follows:

"The surety, or representative of any surety, upon the bond, undertaking, or other obligation of any guardian, assignee, receiver, executor, administrator or other fiduciary, may apply by petition to the court wherein said bond is directed to be filed, or which may have jurisdiction of such guardian, assignee, receiver, executor, administrator, or other fiduciary, praying to

be relieved from further liability as such surety for the acts or omissions of the guardian, assignee, receiver, executor, administrator, or other fiduciary which may occur after the date of the order relieving such surety, to be granted as herein provided for; and for an order requiring such guardian, assignee, receiver, executor, administrator, or other fiduciary to show cause why he should not account and be relieved from any further liability as aforesaid, and that said principal be required to give a new bond. Thereupon, said court shall issue such order, returnable at such time and place and to be served in such manner as said court shall direct, and may in the meantime restrain such guardian, assignee, receiver, executor, administrator, or other fiduciary from acting, except in such manner as said court may direct, for the preservation of the trust estate. If the principal in such bond, undertaking, or other obligation account in due form of law and file a new bond, undertaking, or other obligation, duly approved within the time limited in such order, then said court must make an order releasing said surety filing petition as aforesaid from liability upon the bond for any subsequent act or default of the principal; and in default of said principal thus accounting and filing such new bond within the time limited in such order, said court shall at once make an order directing such guardian, assignee, receiver, executor, administrator, or other fiduciary to account in due form of law within ten days—and if the trust fund or estate shall be found or made good and paid over, or properly secured, such surety shall be discharged from any and all further liability as such for the subsequent acts or omissions of the guardian, assignee, receiver, executor, administrator, or other fiduciary after the date of such surety being relieved or discharged—and further discharging such guardian, assignee, receiver, executor, administrator, or other fiduciary from his position."

The above section was enacted in 1899, and is substantially taken from Section 812, N. Y. Code of Civ. Procedure, as amended by Chapter 568, Laws N. Y.,

passed May 13, 1892. For the purposes of comparison we give the corresponding section in said compilation:

"The surety or sureties or the representatives of any surety or sureties upon the bond of any trustee, committee, guardian, assignee, receiver or executor may present a petition to the court or judge that appointed him, or that approved or accepted such bond, praying to be relieved from further liability as surety or sureties for the acts or omissions of the trustee, committee, guardian, assignee, receiver, or executor occurring after the date of the order relieving surety or sureties, and that the principal on the bond be required to show cause why he should not give new sureties. Thereupon the court or judge must issue the order to show cause accordingly and may restrain such trustee, committee, guardian, assignee, receiver, or executor from acting, except to preserve the trust estate until further order. Upon the return of the order so issued, if the principal in the bond file a bond in the usual form, with new sureties to the satisfaction of the court or judge then, within such reasonable time, not exceeding five days, as the court or judge fixes, the court or judge must make a decree or order releasing the surety or sureties petitioning from liability upon the bond for any subsequent act or default of the principal; otherwise a decree must be made that such trustee, committee, guardian, assignee, receiver, or executor account before the court or judge, or a referee appointed, and that upon the trust fund or estate being found or made good and paid over or properly secured, the surety or sureties shall be discharged from any and all further liability as such of the subsequent acts or omissions of the trustee, committee, guardian, assignee, receiver or executor occurring after the date of his or their being so relieved or discharged, and discharging such trustee, committee, guardian, assignee, receiver, or executor."

2. Previous to its adoption here this section had been construed by the court of appeals of the state of its origin, and according to the commonly accepted rules

of construction it must usually be deemed to have passed here subject to the same interpretation given it by the courts of the state where it originated: *Putnam* v. *Douglas County*, 6 Or. 328 (25 Am. Rep. 527); *State* v. *Finch*, 54 Or. 482 (103 Pac. 505); *Jamieson* v. *Potts*, 55 Or. 292 (105 Pac. 93, 25 L. R. A. (N. S.) 24); *Abraham* v. *Roseburg*, 55 Or. 359 (105 Pac. 401, Ann. Cas. 1912A, 597); and many other cases. The statute last above quoted came up for construction in *American Surety Co.* v. *Thurber*, 162 N. Y. 244 (56 N. E. 631), and the same contention was made in that case as is made by the plaintiff here, in answer to which the court said:

"The appellant claims that the provisions of the section are mandatory, as the word 'must' ordinarily excludes discretion. That word, however, is occasionally used in the code without the imperative meaning which it usually has. (*Spears* v. *Mayor etc.*, 72 N. Y. 442; *Wallace* v. *Feely*, 61 How. Pr. 225, affirmed 88 N. Y. 646.) The provision requiring the court to 'issue an order to show cause,' implies that cause may be shown. It is more than a substitute for a notice of motion, for it is a specific requirement in a statute creating a special remedy, of which it is a part. There is no reason why the principal should be required to show cause, if no cause can be shown under any circumstances. When all the provisions of the section are read together, we think the court has a discretion to exercise depending on the facts of the case, and is not commanded to make a decree regardless of those facts. In other words, we construe the expression 'a decree must be made' under the circumstances to mean 'a decree may be made.'"

This construction is emphasized by the fact that in 1895 the legislature of New York again amended Section 812 by providing in effect that upon notice and accounting, etc., "the surety * * *shall be entitled as*

a matter of right to be and shall be discharged from liability." Subsequent to the latter amendment the same court in the case of *In re United States Fidelity & Guaranty Company*, 50 Misc. Rep. 147 (98 N. Y. Supp. 217), held that under its provisions the surety had an absolute right to be released.

3. No such change has been made in our statute, and until such amendment is made we are disposed to follow the rule laid down in *American Surety Co.* v. *Thurber*, 162 N. Y. 244 (56 N. E. 631), which seems to us to be only fair in requiring a surety who enters into a contract for an agreed consideration to abide by it so long as the other party to the agreement faithfully performs the conditions of his trust.

Counsel for appellant cite a number of cases holding under statutes varying in their terms somewhat that sureties have a peremptory right upon petition for that purpose to be relieved from further liability for the acts or omissions of their principals, but in none of these is there a provision requiring the principal to show cause why the surety shall not be relieved, except in the case of *In re United States Fidelity & Guaranty Company*, 50 Misc. Rep. 147 (98 N. Y. Supp. 217), which, as before shown, depends upon a provision of the statute expressly providing that they shall be discharged "as a matter of right." The other cases are: *Kempner* v. *Galveston Co.*, 73 Tex. 216 (11 S. W. 188); *Sifford* v. *Morrison*, 63 Md. 14; *March* v. *Fidelity & Deposit Co. of Maryland*, 79 Md. 309 (29 Atl. 521); *Cochies Co.* v. *Ritter*, 3 Ariz. 208 (73 Pac. 448); *United States Fidelity & Guaranty Co.* v. *Peebles*, 100 Va. 585 (42 S. E. 310). As before remarked there is no provision in any of the statutes of these states permitting or requiring the principal to show cause why the surety should not be discharged, and this differentiates them

from the case at bar. It would certainly be an anomaly if a party should be required by law to appear and show cause why the court should not make an order which it was imperatively commanded to enter no matter what showing the party cited might be able to make.

The views here announced render unnecessary a consideration of the other questions discussed on the hearing. The judgment is affirmed. AFFIRMED.

MR. JUSTICE MOORE, MR. JUSTICE BENSON and MR. JUSTICE BEAN concur; MR. JUSTICE MCCAMANT not sitting.

Argued March 20, reversed and remanded April 3, rehearing denied May 1, 1917.

ROBINSON *v.* PHEGLEY.

(163 Pac. 1166.)

Fraud—Misrepresentation—Materiality.

1. Where plaintiff, to protect her interest in a corporation, purchased defendant's claims against the company and thereby became owner of its property sold at foreclosure sale, the contract will not be rescinded because of defendant's false representations as to amount of his claims, since plaintiff obtained what she sought; the representations consequently being immaterial.

Fraud—Misrepresentation—Recovery of Excess Payment—Reformation of Contract.

2. Where plaintiff agrees to purchase defendant's claims against a corporation, paying him therefor the amount of his expenditures for the benefit of the corporation, and defendant misrepresents the amount of such expenditures and plaintiff is thereby induced to pay plaintiff $6,000 in excess of such disbursements, plaintiff on discovery of the fraud is entitled to reform the contract of purchase and recover the $6,000 so paid with interest. Plaintiff's right to recover will not be barred by a judgment recovered by defendant against the corporation corresponding in amount with defendant's representations or by plaintiff's purchase of the corporate property at a sale had under such judgment.

Corporations—Stockholder's Rights—Showing Fraudulent Judgment Against Corporation.

3. A stockholder, when confronted with a judgment against the corporation may defeat its effect by showing that it was fraudulently

and collusively secured, although ordinarily stockholders are bound by a judgment against their corporation.

Limitation of Actions—Computation of Period—Discovery of Fraud.

4. Where plaintiff, within a reasonable time after learning of defendant's misrepresentations inducing purchase of claims against corporation, brought suit against him, it was immaterial that suit was not commenced within the six-year statute of limitations, since it is the general rule that statute of limitations will not run during the interval when the party was ignorant of the fraud.

[As to fraud at law as preventing operation of the statute of limitations, see note in 60 **Am. Dec.** 511.]

From Multnomah: GEORGE N. DAVIS, Judge.

Emma G. Robinson commenced this suit against Grant Phegley and from a decree rendered in favor of defendant dismissing the suit on demurrer, the plaintiff appeals. Reversed with directions.

In Banc. Statement by MR. JUSTICE MCCAMANT.

This is a suit brought to rescind two contracts entered into between the parties in the year 1907, under which plaintiff alleges that she paid the defendant $9,600. The suit is brought for the recovery of this sum and certain other damages which plaintiff claims she sustained. The case was tried in the lower court on demurrer to the third amended complaint. The demurrer was sustained and thereupon a decree was entered dismissing the complaint. From this decree plaintiff prosecutes an appeal.

REVERSED AND REMANDED WITH DIRECTIONS.

For appellant there was a brief over the names of *Mr. Roscoe C. Nelson* and *Messrs. Beach & Simon*, with an oral argument by *Mr. Nelson.*

For respondent there was a brief with oral arguments by *Mr. Ralph A. Conn* and *Mr. C. A. Sheppard.*

MR. JUSTICE MCCAMANT delivered the opinion of the court.

The sole question raised by this appeal is the sufficiency of the third amended complaint to which the lower court sustained a demurrer. This complaint alleges that in the year 1907 Galice Consolidated Mines Company was an Oregon corporation owning valuable mining property situate in the State of Oregon, and that plaintiff was a stockholder who had invested $15,000, presumably in the purchase of stock. It is alleged that the defendant represented to plaintiff that he was the owner of valid claims against the corporation for "moneys actually paid, laid out and expended by him" for the corporation, aggregating $9,600; that one of the items making up the said sum of $9,600 was a claim for $6,000 secured by mortgage on the properties of the corporation; that plaintiff, having invested a large sum of money in the stock of the corporation which she desired to protect, was induced by the representations of the defendant to purchase a one-half interest in his claims, paying him therefor $4,800 on June 11, 1907, and was further induced to purchase the other half of said claims on October 19, 1907, paying the defendant the additional sum of $4,800 therefor. The $6,000 mortgage had been foreclosed by decree of the Circuit Court for Josephine County at the time when the first contract was entered into and four days thereafter the property was sold under the decree. It is inferable from the complaint that plaintiff became the owner of the title to the property acquired by this foreclosure sale, and that her title has never at any time been disturbed. The property had been pooled with other properties in the neighborhood prior to plaintiff's purchase, and

plaintiff assumed the burdens of a contract which had been entered into with these other parties under which she claims to have expended large sums of money. She also claims to have done the assessment work on the mineral claims and to have expended $24,000 for such purpose.

The ground for relief alleged in the complaint is that the $6,000 mortgage represented no real indebtedness subsisting between the corporation and the defendant; that the mortgage had been given originally to secure the defendant from liability on a certain undertaking on appeal which he had executed at the instance of the corporation; that all liability on this undertaking had terminated before the first contract between the plaintiff and the defendant; and that the decree for the foreclosure of the mortgage was secured by collusion with the officers of the corporation and with intent to defraud plaintiff.

Plaintiff alleges that she purchased the claims of defendant in reliance on the representations made to her and in ignorance of the facts as she now alleges them to be. She asks for a rescission of the entire contract and for a recovery from the defendant of all sums of money paid him or expended on the property by her. She alleges that she remained in ignorance of the facts and without suspicion thereof until a few months prior to the bringing of this suit. Immediately on ascertaining the facts she demanded restitution from the defendant and alleges that some of the delay in bringing the suit was due to the time allowed to defendant to consider her claim for restitution.

The demurrer attacked the complaint for insufficiency of facts and also on the ground that the suit was not brought within six years after the accrual of plaintiff's cause of suit.

In so far as the plaintiff seeks to rescind the entire contract and to recover damages in excess of $6,000 we think the court did not err in holding the complaint to be insufficient. It was plainly contemplated by the parties when they had the dealings in 1907 that plaintiff should become the owner of the property of the corporation through the foreclosure sale. She did become such owner and there is no allegation that her title has ever been attacked, either by the corporation or any other stockholder therein. It is well settled that fraudulent representations will not justify the rescission of a contract unless the representations be material. This principle is well illustrated by the case of *Bartlett* v. *Blaine,* 83 Ill. 25, 27 (25 Am. Rep. 346). Plaintiff in this case was induced to sign a composition requested by an insolvent debtor from all of his creditors. It was represented to plaintiff that no one had received or would receive any other compensation than the fifty per cent dividend on the claims of the creditors, which were protected by the composition agreement. Plaintiff alleged that this representation was false in that another creditor had been given a note for $500 to induce his signature. The court held that the fraudulent representation was immaterial and gave plaintiff no cause of action.

In the Illinois case, as in this case, a false representation was made with intent to deceive and the belief of the plaintiff in its truth was a motive inducing the contract; but in the Illinois case the creditor secured all that it could have secured if the representation had been true and in this case plaintiff secured the property of the corporation and stood to secure nothing more if the fact had been as represented.

"Where the vendor and vendee are dealing at arm's length with each other, the representations of the

former as to the cost of his property, even though false and made with a view to deceive, will furnish no ground of action'': *Hauk* v. *Brownell,* 120 Ill. 161, 163.

To the same effect are: *Banta* v. *Palmer,* 47 Ill. 99; *Holbrook* v. *Conner,* 60 Me. 578, 581–583 (11 Am. Rep. 212); *Bishop* v. *Small,* 63 Me. 12; *Hemmer* v. *Cooper,* 8 Allen (90 Mass.), 334.

It is not enough that the misrepresentation of a vendor furnishes the vendee with a motive to buy. Such a representation is collateral rather than material.

The material portion of the defendant's representations related to the impending judicial sale of the corporate properties and the consequent danger that plaintiff's stock would be wiped out. In these respects the representations were true. The sale did take place and the purchaser at the sale became the owner of the properties of the corporation.

It is true that the complaint alleges that plaintiff would not have entered into the contract for the purchase of defendant's claims but for the false representations which were made to her. But the complaint shows affirmatively that there were valid claims against the corporation to the extent of $3,600, owned by the defendant, and additional claims in excess of $5,000, on which other creditors had secured judgment against the corporation. The manifest purpose of plaintiff was to acquire title to the property of the corporation and thus preclude the loss of a large sum of money which she had already invested. There is no allegation that she was deceived as to the character of the properties or that any misrepresentation was made to her about them. She got what the parties contemplated that she should get, and she could have got no more if the representation had been true. Therefore she is not entitled to a rescission.

As regards her right to recover the $6,000 paid in the purchase of the defendant's mortgage, which represented no debt and which was collusively foreclosed, the case stands on a somewhat different footing. It is alleged that plaintiff agreed to pay the defendant "the sums actually paid, laid out and expended by the defendant for and on behalf of the said corporation." This allegation is borne out by the written contract entered into by the parties on June 11, 1907, which is attached as an exhibit to the complaint. It contains the following clause:

"In consideration of the foregoing, the said party of the first part does hereby agree to pay to said party of the second part one half of the amount of his claim against said company at the present time, including one half the money expended by him in the care of said property, amounting in all to ninety-six hundred dollars."

It appears therefore that the agreement on which the minds of the parties met was that plaintiff should pay the defendant just what the defendant had expended on behalf of the corporation. Plaintiff contracted to pay one half of this sum in the first contract, and the other half thereof in the second contract with the defendant. It is now alleged in effect that although the defendant had in fact paid out for the benefit of the corporation only $3,600, he alleged that he had paid $9,600, and by this false representation he induced plaintiff to pay $6,000 in excess of what the agreement between the parties contemplated. We think the allegations of the complaint can be upheld as stating a cause of suit for the reformation of the contract in this respect, and for the recovery by plaintiff of $6,000 with interest.

The defendant strenuously contends that the decree of foreclosure standing unreversed is a bar to the litigation of plaintiff's claim. This decree was rendered in a suit to which plaintiff was not a party. It is said that she was a stockholder of the corporation and is therefore bound by the decree. The case at bar was not brought by plaintiff as a stockholder, although her complaint contains an allegation that she was such stockholder. The cause of suit alleged is based upon her claim arising out of the contracts of June 11, 1907, and October 19, 1907. Her ownership of stock is alleged as a motive for entering into these agreements.

Furthermore, the great weight of authority sustains plaintiff's contention that a stockholder in a corporation when confronted with a judgment against the corporation may defeat its force and effect by showing that it was fraudulently and collusively secured. The authorities hold that this contention may be asserted by a stockholder without obtaining a decree setting aside such fraudulent judgment. We think the law in this jurisdiction is settled by *Saylor* v. *Commonwealth Banking Co.*, 38 Or. 204, 209 (62 Pac. 652, 654). In this case a judgment had been secured against the Commonwealth Banking Company on which it was sought to recover unpaid stock subscriptions from certain stockholders. These stockholders alleged that the judgment had been fraudulently obtained. The fraud set up involved, among other things, collusion with the officers of the corporation to permit a default judgment to be entered against their company. This court, speaking through Mr. Chief Justice BEAN, announced the familiar principle that ordinarily stockholders are bound by a judgment against their corporation. He then said:

"But, while a judgment against the corporation is binding upon and conclusive as against the stockholders in a suit to subject the unpaid balance due from them on their subscription to the capital stock to the payment thereof, yet, as appears from the foregoing quotations, the stockholder may in such a proceeding go behind the judgment, and impeach it for fraud."

"It is immaterial, as we view it, whether the attack in this case is strictly direct or collateral. The suit is instituted for the purpose of enforcing the judgment against persons who were not actually parties to the record on which it was rendered, and we cannot perceive why they should not be allowed to set up, by way of answer, as a reason why it should not be enforced against them, that it was obtained by fraud, and, especially, that it is invalid on its face."

The above case does not stand alone. It is in accord with the best considered authorities in other jurisdictions. See, for example, *Bissit* v. *Kentucky Co.* (C. C.), 15 Fed. 353; *Warrington* v. *Ball,* 90 Fed. 464 (33 C. C. A. 609); *Choate* v. *Boyd,* 59 Kan. 682 (54 Pac. 1042). See also the following text-books in which the above doctrine is announced as settled law: Cook on Corporations (7 ed.), § 848 (i), citing many cases; 4 Thompson on Corporations (2 ed.), § 4982; 2 Van Fleet on Former Adjudication, 998; 10 Cyc. 734; 7 R. C. L. 421. We are therefore of the opinion that the foreclosure decree is no bar to the recovery by plaintiff of the $6,000 if she can prove her allegations of fraud and collusion.

The demurrer challenges the sufficiency of the complaint on the ground that the suit was not brought within six years. It appears that the suit was brought within a reasonable time after the discovery of the fraud which constitutes the cause of suit. In

Sedlak v. *Sedlak*, 14 Or. 540, 541 (13 Pac. 452), Mr. Chief Justice LORD says:

"The general rule, without doubt, is, that no lapse of time or delay in bringing the suit will be a bar to the remedy in equity, providing the injured party, during the interval, was ignorant of the fraud."

We think the complaint is not obnoxious to objection on this ground.

The decree should be reversed and the cause remanded with instructions to overrule the demurrer.

REVERSED AND REMANDED WITH DIRECTIONS.

REHEARING DENIED.

Argued March 29, affirmed April 10, rehearing denied May 1, 1917.

HETRICK *v.* GERLINGER MOTOR CAR CO.

(164 Pac. 379.)

Appeal and Error—Assignment of Error—Complaint—Amendment.

1. Where error is not assigned to the order of the lower court in permitting matter to be set up in a supplemental complaint which should have been pleaded by way of amendment to the original complaint, the appellate court will treat such supplemental complaint as an amendment of the original complaint properly allowed.

Equity—Retaining Jurisdiction—Award of Damages.

2. As a suit to rescind a contract for the purchase of an article and to cancel a note given on account of the purchase price and recover damages is cognizable in equity, when it later appears that the note has been negotiated, as such facts were not known to the plaintiff when he brought the suit, equity will retain the suit for the purpose of awarding plaintiffs the money damages to which they are entitled.

[As to exceptions to the rule that a court of equity assuming jurisdiction for one purpose will retain it for all purposes, see note in 116 **Am. St. Rep.** 877.]

Evidence—Parol Evidence—Varying Written Contract.

3. In view of Section 713, L. O. L., providing that when the terms of an agreement have been reduced to writing it is considered as containing all those terms except "(2) where the validity of the agreement is the fact in dispute," in a suit to rescind a contract for the

purchase of a motor truck, to cancel a promissory note given on account of the purchase price and to recover damages, a provision in the memorandum of sale that "it is understood by the parties hereto that there are no understandings or agreements verbal or otherwise other than those printed or written hereon" did not preclude testimony on the part of the plaintiffs to prove the alleged misrepresentations in reliance on which the truck was purchased, since they are not seeking to modify the written contract in any respect, but are contending that there was no contract because of the fraud perpetrated.

Sales—Validity—Misrepresentations.

4. Where a motor truck was purchased February 3d and suit was brought March 20th for rescission of the contract of purchase, and in the few weeks intervening between these dates the buyers twice returned the truck to the seller on the seller's promises to repair the truck and make it good, and the buyers complained continually that the car was unsatisfactory, and when finally apprised of the history of the truck promptly disaffirmed and brought suit, they were not barred of their remedy under the rule that where a person has been induced through fraud to execute a contract in order to avail himself of this defense, he should act promptly upon the discovery of the deception.

From Multnomah: HENRY E. MCGINN, Judge.

This is a suit against the Gerlinger Motor Car Company, a corporation, brought by M. Hetrick and W. M. Cline, copartners in business under the firm name and style of Hetrick & Cline, and heard by the lower court sitting in equity to a jury that returned a verdict in favor of plaintiffs, and defendant appeals. Affirmed. Rehearing denied

Department 1. Statement by MR. JUSTICE MCCAMANT.

This is a suit brought by M. Hetrick and W. M. Cline, partners as Hetrick & Cline, to rescind a contract for the purchase of a motor truck, to cancel a promissory note given on account of the purchase price and to recover damages. It is alleged that on February 3, 1915, plaintiffs purchased from the defendant the motor truck in question at an agreed price of $2,500; $100 was paid in cash and plaintiffs gave the defendant their negotiable promissory note in the sum

of $2,400, payable in monthly installments of $200 each.

It is alleged that the purchase was induced by fraudulent representations to the effect that the "truck was practically new"; that the "tires on the said truck were the original tires first placed on the said truck"; and that the car "had not been run more than five hundred miles" prior to its purchase by plaintiffs. The complaint charges that in truth and in fact the truck had been run more than four thousand miles; that its engine was worn to such an extent as to be valueless; that the original tires placed on the truck had been worn out and that the tires which were on it at the time of plaintiffs' purchase were new tires which had replaced the original ones. It is alleged that the false representations were made with the intent to deceive plaintiffs and that the plaintiffs purchased in reliance on them, to their injury.

Subsequent to the bringing of this suit plaintiffs learned that the defendant had negotiated their promissory note to one Seymour H. Bell, who was a *bona fide* purchaser thereof. They thereupon filed a supplemental complaint alleging this fact and a payment which they had been obliged to make to Bell. Because of the allegations of the supplemental complaint plaintiffs ask for no further relief except a money judgment against the defendant.

The defendant denied all the allegations of the complaint and the supplemental complaint except the purchase of the truck and the terms of the payment therefor. It was affirmatively alleged in the answer that plaintiffs had an adequate remedy at law; that plaintiffs had ratified the representations, if any, by retaining the truck in their possession and having it repaired; and that plaintiffs were thoroughly advised of the condition of the truck at the time of their pur-

chase. It was further alleged that the contract of sale was in writing and that it had been entered into after a thorough examination and test of the truck. The reply denied the affirmative allegations of the answer.

The trial court sitting in equity elected to refer the controversy to a jury, which found a verdict for the plaintiffs. A decree was entered on this verdict and the defendant appeals.

AFFIRMED. REHEARING DENIED.

For appellant there was a brief and an oral argument by *Mr. Maurice W. Seitz.*

For respondent there was a brief over the name of *Messrs. Manning, Slater & Leonard,* with an oral argument by *Mr. Woodson T. Slater.*

MR. JUSTICE MCCAMANT delivered the opinion of the court.

It is true, as contended by the defendant, that the matter set up in the supplemental complaint should have been pleaded by way of amendment to the original complaint; but error is not assigned on the order of the lower court permitting the supplemental complaint to be filed. We will therefore treat it as an amendment of the original pleading, properly allowed.

It would serve no useful purpose to state in this opinion the evidence on the subject of the fraud. It strongly preponderates in favor of plaintiffs and convincingly proves the allegations of the complaint. It is proper to add that the evidence does not connect Mr. Edward E. Gerlinger, the general manager of defendant, with the fraudulent representations.

The defendant contends that the decree should be reversed because there is an adequate remedy at law.

The original complaint stated a cause of suit cognizable in equity, as plaintiffs were entitled to the cancellation of their note, assuming that defendant still held it. This note having passed into the hands of an innocent purchaser prior to the bringing of the suit, it is contended that there was no ground on which equity could try out the controversy, although plaintiffs were in ignorance of the negotiation of the note at the time when they brought their suit.

It is true, as the defendant contends, that equity will not take jurisdiction merely because the suit is based on fraud. If the remedy at law be adequate the parties will ordinarily be relegated to a court of law. It has been repeatedly held in this jurisdiction that in case plaintiff fails to prove his allegations on which alone the equitable jurisdiction is predicated, a court of equity will not award him a money judgment: *Ming Yue* v. *Coos Bay R. R. Co.*, 24 Or. 392 (33 Pac. 641, 19 L. R. A. (N. S.) 1066, n.); *Stemmer* v. *Scottish Co.*, 33 Or. 65 (53 Pac. 498, 19 L. R. A. (N. S.) 1069); *Denny* v. *McCown*, 34 Or. 47, 53 (54 Pac. 952, 19 L. R. A. (N. S.) 1073, n.); *Multnomah Co.* v. *Portland Cracker Co.*, 49 Or. 345, 352 (90 Pac. 155, 19 L. R. A. (N. S.) 1069, n.). These were all cases in which the plaintiff had never had an equitable cause of suit and in which he was chargeable with notice that his remedy was at law. The case at bar is distinguishable from the cases above cited in that these plaintiffs without question had a remedy in equity prior to the negotiation of their promissory note. They brought the suit in ignorance of such negotiation and without notice of any facts sufficient to put them on inquiry with reference thereto. There is authority to the effect that an equitable suit brought under such circumstances will be retained for the purpose of awarding plaintiffs the

money damages to which they are entitled, whenever the act of the defendant has created a situation which makes distinctively equitable relief impracticable. In 1 Pom. Eq. Jur. (3 ed.), Section 237, the rule is stated as follows:

"If a court of equity obtains jurisdiction of a suit for the purpose of granting some distinctively equitable relief, such, for example, as the specific performance of a contract, or the rescission or cancellation of some instrument, and it appears from facts disclosed on the hearing, but not known to the plaintiff when he brought his suit, that the special relief prayed for has become impracticable, and the plaintiff is entitled to the only alternative relief possible of damages, the court then may, and generally will, instead of compelling the plaintiff to incur the double expense and trouble of an action at law, retain the cause, decide all the issues involved, and decree the payment of mere compensatory damages."

The foregoing rule is supported by *Milkman* v. *Ordway,* 106 Mass. 232, and *Cole* v. *Getzinger,* 96 Wis. 559, 577 (71 N. W. 75). We believe the rule to be a sound one and that the decree is not open to objection on this ground. We are the more ready to follow these authorities in the case at bar because the defendant has had a trial by jury and because the evidence is so clear that no trier would be apt to come to a different conclusion from that reached by the jury and the lower court.

At the time of the purchase a memorandum of sale was signed by the plaintiffs and also by Fred W. West, as manager of the defendant, which contained the following language:

"It is understood by the parties hereto that there are no understandings or agreements, verbal or otherwise, other than those printed or written hereon."

It is contended that because of this circumstance it is not competent for the plaintiffs to prove the misrepresentations in reliance on which the truck was purchased. On this branch of the case the defendant relies on *Equitable Mfg. Co.* v. *Biggers,* 121 Ga. 381, 382 (49 S. E. 271). In the Georgia case the contract signed by the parties contained the following language:

"This sale is made under inducements and representations herein expressed and no others."

The court held that this language precluded testimony on the part of the defendant of contemporaneous representations which were false and fraudulent. The agreement in the case at bar is distinguishable from that of the Georgia case, in that it makes no mention of inducements and representations. The agreement in the instant case specifies merely that there are no understandings or agreements except those expressed in the contract. If plaintiffs in the case at bar were seeking to charge the defendant with warranties their proof might be excluded as in contradiction of the written contract. But plaintiffs are not seeking to modify the written contract in any respect. They are contending that there was no contract because of the fraud perpetrated. The rule applicable is statutory in this jurisdiction. Section 713, L. O. L., is as follows:

"When the terms of an agreement have been reduced to writing by the parties, it is to be considered as containing all those terms, and therefore there can be, between the parties and their representatives or successors in interest, no evidence of the terms of the agreement, other than the contents of the writing, except in the following cases:

"1. Where a mistake or imperfection of the writing is put in issue by the pleadings;

"2. Where the validity of the agreement is the fact in dispute."

In the case at bar the validity of the agreement is the fact in dispute and it was competent for plaintiffs to offer evidence in support of their allegations, going to the ultimate fact that the minds of the parties never met because of the fraud of the defendant in the respects pointed out in the complaint. Our conclusion on this branch of the case is supported by the recent decision of *Bouchet* v. *Oregon Motor Car Co.*, 78 Or. 230, 236 (152 Pac. 888), where under a state of facts closely akin to those in this case the same rule was announced, supported, however, by different reasoning.

It is also contended that the plaintiffs are barred of their remedy by retaining the truck in their possession and making use of it in their business.

"It is the general rule that any person who has been induced through fraud to execute a contract of any kind, in order to avail himself of that defense should act promptly upon the discovery of the deception"; *Waymire* v. *Shipley*, 52 Or. 464, 474 (97 Pac. 807).

This rule is well established, but the facts do not bring this case within its operation. The truck was purchased February 3, 1915; this suit was brought March 20, 1915. In the few weeks intervening between these dates the plaintiffs twice returned the truck to the defendant on the defendant's promises to repair it, and whatever delay took place in the repudiation of the contract was induced by the defendant's promises to repair the truck and to make it good. Plaintiffs complained continually that the car was unsatisfactory and when finally apprised of the history

of the truck they promptly disaffirmed and brought this suit.

The decree of the lower court is affirmed.

Affirmed. Rehearing Denied.

Mr. Chief Justice McBride, Mr. Justice Burnett and Mr. Justice Bean concur.

Argued April 12, reversed May 1, 1917.

McCOY *v.* THOMPSON.*

(164 Pac. 589.)

Dedication—Plat—Sales With Reference to Recorded Plat—Effect.

1. Dedications are of two general kinds: Common law and statutory. Common-law dedications may be either express or implied, while a statutory dedication operates as a grant. Also, *held*, that an unsuccessful attempt to dedicate land under a statute, if followed by sales with reference to the plat, may result in a completed common-law dedication.

Dedication—Intent of Dedicator—Construction—Streets.

2. The intent of the dedicator must be clearly manifest, and if the dedication is statutory, the plat and writings furnish the means to ascertain such intent, and must be construed as other writings, while a common-law dedication is determined from the dedicator's acts, conduct and what he said, and construed to give effect to the intent so manifested. Where the plat contains the words "street forty ft. wide" it expresses in plain terms an intent to make a public way, in all that the term implies, and does not mean a private way.

Dedication—Acceptance by County and Improvement of Street not Essential.

3. Neither a formal acceptance by the county nor the immediate opening and improvement of a street are essential to complete an irrevocable dedication.

[As to acceptance as an essential to the dedication of a highway, see note in 15 **Am. St. Rep.** 31.]

Dedication—Irrevocable Dedication by Referring in Deed to Recorded Plat.

4. Even where express words of dedication are not to be found in the dedication deed, and the street in question is shown by the plat,

*On dedication of land to public use, see note in 6 **L. R. A.** 259. Reporter.

the sale of lots by the proprietor with reference to such plat is sufficient to constitute a completed and irrevocable dedication, and is, therefore, binding upon the dedicator's successors in interest.

Adverse Possession—Evidence Insufficient to Establish—Statutes—Streets.

5. Inclosing a part of a street for some seventeen years does not establish title by adverse possession, for the reason that in 1895 (Laws 1895, p. 57), an act was passed by the legislative assembly preventing the extinguishment of highways by adverse possession. (See, also, Laws 1903, p. 279; Sections 6371, 6372, L. O. L.)

From Marion: William Galloway, Judge.

Department 1. Statement by Mr. Justice Harris.

Alice McCoy is prosecuting this suit in an attempt to enjoin E. A. Thompson from inclosing and occupying a strip of land 40 feet in width, which the latter claims to own and the former asserts is a street. The controversy arises out of the platting of an addition to the unincorporated town of Mill City. H. J. Hadley owned a considerable tract of land which was bounded on the south by the Santiam River. Hadley platted the south end of the tract and left the remainder unplatted. The plat delineates 12 lots arranged in a single row extending east and west with lot 1 as the east end of the row. All the lots except lot No. 4 are 100 feet deep, and with the exception of lot No. 4 all have a frontage of 50 feet on Front Street. The Santiam River pursues a westerly course and the entire space between the north bank of the Santiam River and the frontage of the 12 lots is labeled Front Street. In brief, the plat portrays a row of 12 lots facing Front Street, which runs east and west and is parallel with and next to the Santiam River. While the plat does not expressly state that it is drawn to a scale, it nevertheless appears to have been so drawn.

The land in controversy adjoins lot No. 1 on the east. It will be recalled that lot No. 1 is the east end of the

row of lots. A single line is drawn on the plat to the east of, parallel with and approximately the same length as the east side line of lot No. 1. The open space between this single line and the east side of lot No. 1 is labeled thus: "Street 40 feet wide bears North." The plat contains the caption: "Hadley's Addition to Mill City."

The plat, together with a writing signed by Hadley and a jurat signed by a notary public, was recorded on February 14, 1889, by the county recorder. The writing signed by Hadley is here set out:

"Hadley's Addition to Mill City.

"Laid out on my land Feb. 1, A. D. 1889. The southeast corner of lot No. 1 is on the north side of the Santiam River 47 links North and three chains and ten links West of the N. W. corner of the Mill lot, of the Santiam Lumbering Company, which N. W. corner aforesaid is on the W. side of section 30, T. 9 S., R. 3 E., Wil. Mer. The lots are 50 by 100 feet and the first three are to the cardinal points, No. 4 is fractional 64 feet next to the river and 34½ feet, back end. The south ends of lots 4 to 12 have a bearing N. 73° 2′ W. and their sides are at right angles thereto or N. 16° 58′ E. 100 feet. Front Street occupies all the land between the lots and the river not more than 50 feet, situated in Marion County, State of Oregon. I herewith submit this plot and description for record."

The jurat bears date February 4, 1889, and reads thus:

"Personally came before me a notary public in and for the aforesaid county and state, the above named H. J. Hadley, to me personally known to be the identical person who signed this instrument and who acknowledged to me that he executed the same freely and for the uses and purposes therein mentioned."

The plaintiff owns lot No. 1 and she traces her title through mesne conveyances to a deed made by Hadley.

Under date of April 18, 1889, Hadley conveyed by warranty deed to Angus Scott Shaw "Lot number 1 One in block number 1 One in Hadley's Addition to Mill City in the County of Marion and State of Oregon as it appears on the recorded plat of said Hadley's Addition to Mill City in the recorder's office at Salem in said Marion County." Shaw and his wife moved on lot No. 1 in 1889 and lived there until 1899, when they sold the property and moved away.

The defendant claims title to the disputed land by virtue of a deed from James M. Wadsworth who had previously purchased from Hadley. On April 29, 1904, Wadsworth received from Hadley a deed describing 106 acres and also lands described thus:

"The North half (½) of the southeast quarter of section thirty (30) in township nine (9) south of range three (3) east; except Hadley's Addition to Mill City."

Subsequently, on March 27, 1915, Wadsworth executed and delivered to the defendant a warranty deed for lands described by metes and bounds including the disputed tract as well as other land.

At some time after he purchased lot No. 1, probably about 1893, Shaw went to Hadley and, according to the testimony of the latter, "he asked me, if I remember aright, if I thought there would be any objection, or if I objected to him putting a garden in there, and as near as I can remember the answer I gave him that I had no objections if nobody else had."

Shaw constructed a fence across the south end of the 40-foot strip on the north line of Front Street, but he also provided a gate so that a team and wagon could be driven in or out of the inclosure. This fence and gate were maintained continuously until about 1910, when both the fence and gate were torn down and removed. During the entire period beginning with

about 1893 and ending with about 1910, Shaw and his successors used part of the 40-foot strip for garden purposes. The disputed strip remained open and uninclosed or as one witness said: "It lay as waste land" from 1910 until July, 1914, when the defendant rented the disputed land from Wadsworth, erected on it a tent in which he has since lived, and inclosed it by constructing a fence along the north line of Front Street. After Thompson acquired his deed in 1915, he claimed that he was the owner of the 40-foot strip and denied that the plaintiff or the public had any right to enter upon the disputed premises. The alleged street is of no direct benefit to any persons except the plaintiff, J. W. Jackson, who owns land immediately to the east, and possibly one other person. Some of the witnesses averred and others denied that the strip had been regarded by the public as a street. Two witnesses in addition to the plaintiff and her husband testified that they had used the premises as a street without asking permission from anyone; but Wadsworth insisted that the witnesses first obtained permission from him. No part of the disputed strip has ever been improved as a road or street, and no public officer has ever asserted or exercised control over it.

The complaint avers that Hadley dedicated the land as a street. The answer denies the alleged dedication and avers that the defendant and his predecessors have had adverse possession for the requisite period of time. The trial court found that the land had never been laid off or platted as a street and that the defendant owned the premises in fee simple. The decree followed the finding and the plaintiff appealed.

Reversed.

For appellant there was a brief over the names of *Mr. William H. Trindle* and *Mr. Charles Z. Randall,* with an oral argument by *Mr. Trindle.*

For respondent there was a brief over the names of *Messrs. McNary & McNary, Mr. Everil M. Page* and *Mr. Lauflin M. Curl,* with an oral argument by *Mr. John H. McNary.*

Mr. Justice Harris delivered the opinion of the court.

Although the plaintiff contends that a street extends from Front Street for a distance of 160 feet, or 60 feet beyond the rear or north end of lot No. 1, yet, since there is no evidence to sustain a finding that a street extends farther than 100 feet or the length of lot 1, we shall confine our attention to the question of whether a street 40 feet wide extends from Front Street along the east side of lot No. 1. If Hadley did not by his acts and conduct dedicate the disputed strip as a street, then plaintiff cannot prevail, and therefore the first inquiry is whether there was a dedication.

The inquiry will not be influenced by the parol testimony given by Hadley to the effect that he intended to dedicate the land as a street. We do not undertake to determine whether that testimony was competent since it is in no wise necessary to a decision of this suit; and while there is a contrariety of judicial opinion concerning that character of evidence, we content ourselves by merely noting some of the relevant authorities and assuming that the evidence is incompetent: *Hobson* v. *Montieth,* 15 Or. 251, 256 (14 Pac. 740); *Spencer* v. *Peterson,* 41 Or. 257, 260 (68 Pac. 519, 1108); 1 Elliott on Roads and Streets (3 ed.), § 173;

Los Angeles v. *McCollum*, 156 Cal. 148 (103 Pac. 914, 23 L. R. A. (N. S.) 378).

Dedications are of two general kinds: Statutory and common law: *Nodine* v. *Union*, 42 Or. 613, 616 (72 Pac. 582). Common-law dedications may either be express or implied: 1 Elliott on Roads and Streets (3 ed.), § 133. Generally, by reason of the terms of the statute, a statutory dedication operates as a grant: 8 R. C. L., p. 897. Some authorities declare that common-law dedications always operate upon the principle of an estoppel, while others go no further than to say that such a dedication is of itself a distinctive common-law doctrine based upon principles analogous to those underlying estoppels. The theory usually accepted is: That to reclaim land would be a violation of good faith to the public and to those who have acquired private property with the expectation of enjoying the use contemplated by the dedication; and in case of the sale of a lot with reference to a plat there is the added feature that an easement indicated by the plat constitutes a part of the consideration passing to the purchaser: 8 R. C. L., p. 906; 13 Cyc. 437; 1 Elliott on Roads and Streets (3 ed.), § 125.

Upon examination of the writing accompanying the plat it will be observed that there are no words of grant, and although Front Street is mentioned, no direct reference is made to any other street. Obviously it was the purpose of Hadley to comply with the requirements at that time exacted by the statute. The writing is not in the form usually adopted and it may well be the subject of debate as to whether it constitutes a perfect statutory dedication. We do not attempt to decide, however, whether the plat and writing as recorded produced a statutory dedication; but, for the purposes of this discussion we shall assume, with-

out deciding, that a statutory dedication was not effected. An unsuccessful attempt to dedicate land under a statute if followed by sales with reference to the plat may result in a completed common-law dedication: 8 R. C. L., 893, 897; 13 Cyc. 441; 1 Elliott on Roads and Streets (3 ed.), § 124.

The intent of the dedicator is the foundation and life of all dedications and the intent must be clearly manifested. Where the dedication is statutory in character the plat and writing generally furnish the means by which to ascertain the intent, and these, like all other writings, must be construed by the terms contained in them. In the case of a common-law dedication, the intent is to be determined from what the dedicator said in making the dedication and by his acts and conduct; and the rule of construction is to give effect to the intent manifested: *Christie* v. *Bandon,* 82 Or. 481 (162 Pac. 248); *Carter* v. *Portland,* 4 Or. 339, 340, 343; *Lewis* v. *Portland,* 25 Or. 133, 134 (42 Am. St. Rep. 772, 35 Pac. 256, 22 L. R. A. 736); *Kuck* v. *Wakefield,* 58 Or. 549, 555 (115 Pac. 428); *Jones* v. *Teller,* 65 Or. 328, 332 (133 Pac 354); *Parrott* v. *Stewart,* 65 Or. 254, 259 (132 Pac. 523); *Eugene* v. *Lowell,* 72 Or. 237 (143 Pac. 903); *Harris* v. *St. Helens,* 72 Or. 377 (143 Pac. 941, Ann. Cas. 1916D, 1073); 8 R. C. L., pp. 890, 896; 4 Ency. of Ev. 110; 13 Cyc. 452; 1 Elliott on Roads and Streets (3 ed.), § 130.

We now turn to the plat and the writing accompanying it for the purpose of discovering whether Hadley intended to dedicate the 40-foot strip next to lot No. 1 as a street. At the time of filing the plat Hadley owned all the land including the disputed premises. No street existed on any part of the Hadley land until the plat was filed. There is no evidence to indicate that the 40-foot strip had ever been used

as a right of way or a road, or as a street at any time prior to 1889, and therefore the words "street, 40 ft. wide" did not describe a street previously existing, but, on the contrary, they refer to a street which in no way existed until delineated on the plat. The space made by the line drawn to the east of and parallel with the east line of lot No. 1, and the words "street 40 ft. wide" express in plain and unmistakable terms an intent to make a street of the 40-foot strip. The word "street" has a definite meaning. When the owner of land makes a plat and refers to a "street," he does not mean a private way; but the word signifies a public way in all that the term implies: 1 Elliott on Roads and Streets (3 ed.), § 21; *City of Denver* v. *Clements,* 3 Colo. 472; *Smith* v. *City of Goldsboro,* 121 N. C. 350 (28 S. E. 479). The plat and writing clearly manifest an intention on the part of Hadley to dedicate the disputed land as a street; and, indeed, the 40-foot strip appears upon the plat in such a manner as to be entirely inconsistent with any other theory: *Oregon City* v. *Oregon & C. R. Co.,* 44 Or. 165 (74 Pac. 924).

It is true that the disputed premises were never improved as a street nor formally accepted by the county; but the well-recognized rule is that neither a formal acceptance by the county nor the immediate opening and improvement of a street are essential to complete an irrevocable dedication: *Carter* v. *Portland,* 4 Or. 339, 340, 347, 348; *Meier* v. *Portland Cable Ry. Co.,* 16 Or. 500 (1 L. R. A. 856, 19 Pac. 610); *Hogue* v. *Albina,* 20 Or. 182, 186 (10 L. R. A. 673, 25 Pac. 386); *Spencer* v. *Peterson,* 41 Or. 257, 260 (68 Pac. 519, 1108); *Oregon City* v. *Oregon & C. R. Co.,* 44 Or. 165, 178 (74 Pac. 924); *Christian* v. *Eugene,* 49 Or. 170, 173 (89 Pac. 419); *Oliver* v. *Synhorst,* 58 Or.

582, 585 (109 Pac. 762, 115 Pac. 594); *Moore* v. *Fowler,* 58 Or. 292, 297 (114 Pac. 472); *Silverton* v. *Brown,* 63 Or. 418, 424 (128 Pac. 45); *Harris* v. *St. Helens,* 72 Or. 377, 387 (143 Pac. 941, Ann. Cas. 1916D, 1073); *Barton* v. *Portland,* 74 Or. 75, 79 (144 Pac. 1146); *Nichols* v. *Title & Trust Co.,* 79 Or. 226, 244 (Ann. Cas. 1917A, 1149, 154 Pac. 391); Elliott on Roads and Streets (3 ed.), §§ 124 and 129.

The offer made by Hadley to dedicate the street became a completed and irrevocable dedication when he delivered the deed to Shaw. The conveyance was made with express reference to the recorded plat for lot number one is described as being lot No. 1 "as appears on the recorded plat of said Hadley's Addition to Mill City in the recorder's office at Salem in said Marion County": *Portland* v. *Whittle,* 3 Or. 126, 129; *Carter* v. *Portland,* 4 Or. 339, 340, 346; *Meier* v. *Portland Cable Ry. Co.,* 16 Or. 500 (1 L. R. A. 856, 19 Pac. 610); *Steel* v. *Portland,* 23 Or. 176, 184 (31 Pac. 479); *Mutual Irr. Co.* v. *Baker City,* 58 Or. 306, 321 (110 Pac. 392, 113 Pac. 9); *Moore* v. *Fowler,* 58 Or. 292, 297 (114 Pac. 472); *Kuck* v. *Wakefield,* 58 Or. 549, 552 (115 Pac. 428); *Jones* v. *Teller,* 65 Or. 328, 332 (133 Pac. 354); *Spencer* v. *Peterson,* 41 Or. 257, 260 (68 Pac. 519, 1108); *Oregon City* v. *Oregon & C. R. Co.,* 44 Or. 165, 176 (74 Pac. 924); *Christian* v. *Eugene,* 49 Or. 170, 172 (89 Pac. 419); *Hogue* v. *Albina,* 20 Or. 182, 186 (10 L. R. A. 673, 25 Pac. 386); *Nicholas* v. *Title & Trust Co.,* 79 Or. 226, 244 (Ann. Cas. 1917A, 1149, 154 Pac. 391); 8 R. C. L. 890.

Usually the dedicator employs language to the effect that he dedicates all his interests in the streets shown by the plat, and an examination of the Hadley plat and writing will disclose that neither this nor equivalent language is used; but, as said in *Oliver* v.

Newberg, 50 Or. 92, 96 (91 Pac. 470): "Even where such words of dedication are omitted, and the street is shown by the plat, the sale of lots by the proprietor with reference to such plat is sufficient to complete such dedication."

Ordinarily the sale of a single lot completes the dedication and more especially does the sale of a single lot effect a dedication of a street upon which the lot abuts; and consequently the sale of lot No. (1) to Shaw operated as an acceptance of the offer of Hadley to dedicate the adjacent land as a street and rendered the dedication irrevocable: *Roberts* v. *Mathews*, 137 Ala. 523 (34 South. 624, 97 Am. St. Rep. 56); 1 Elliott on Roads and Streets (3 ed.), § 128.

The deed delivered by Hadley to Wadsworth on April 29, 1904, expressly excepts "Hadley's Addition to Mill City," and therefore Wadsworth acquired no greater rights than Hadley owned; and Thompson, who purchased from Wadsworth, does not own more than his immediate grantor. The dedication which was effected by the sale of lot No. 1 to Shaw on April 18, 1889, not only bound Hadley but it also bound his successors in interest, Wadsworth and Thompson: *Parrish* v. *Stephens*, 1 Or. 73, 75 76; *Portland* v. *Whittle*, 3 Or. 126, 129.

The defense of adverse possession relied upon by the defendant must fail. It is true that Shaw inclosed the premises and used the land for a garden and this use was continued by his successors until about 1910. Hadley did not sell to Wadsworth until 1904. The testimony of Hadley demonstrates that the use made of the land by Shaw did not constitute adverse possession. If any person claimed the land adversely it was only after Wadsworth purchased in 1904. The uncontradicted evidence is that the fence

was torn down and removed in 1910, and after that time the premises "lay as waste land" until July, 1914. The evidence fails to show adverse possession for ten years.

There is, however, an additional circumstance affecting the claim of adverse possession. In 1895 the legislature declared that all streets in unincorporated towns were public highways and jurisdiction over them was conferred upon the county courts of the various counties: Laws 1895, p. 57. At the same session of the legislative assembly an act was passed preventing the extinguishment of highways by adverse possession (Laws 1895, p. 57); the statute was re-enacted in 1903 (Laws 1903, p. 279); and is now codified as Sections 6371 and 6372, L. O. L.

Hadley dedicated a strip 100 feet long and 40 feet wide as a street as shown on the plat and the dedication became irrevocable when the abutting lot was sold to Shaw, and since the completed dedication was not subsequently defeated, the plaintiff as the owner of lot No. 1 is entitled to use the disputed strip as a street. The decree is reversed. Reversed.

Mr. Chief Justice McBride, Mr. Justice Burnett and Mr. Justice McCamant concur.

Argued April 18, affirmed May 1, 1917.

KNIGHTON *v.* CHAMBERLIN.

(164 Pac. 703.)

Mortgages—Assumption of Mortgage Debt—Evidence.

1. In a suit against C. and H. to foreclose a mortgage on land, conflicting evidence *held* to support a court finding that H. by oral agreement assumed the mortgage.

Mortgages—Oral Promise to Assume Mortgage—Enforceability.

2. A verbal promise by grantee to assume and pay a mortgage on land, if clearly established, is valid and enforceable in equity.

Equity—Mortgage Foreclosure—Sufficiency of Averments to Support Decree.

3. In a suit to foreclose a mortgage on land sold by the mortgagor, averments of cross-complaint *held* sufficient to uphold decree that H., the purchaser, assumed and agreed to pay mortgage, and became personally liable therefor, and that, in case of deficiency upon sale, plaintiff be required first to enforce demand against H., and that cross-complainant have judgment against H. for any sum which he may be compelled to pay plaintiff.

[As to right of a creditor of vendor to enforce a mortgage assumed by vendee, see note in **Ann. Cas. 1914C, 499.**]

From Marion: WILLIAM GALLOWAY, Judge.

Department 2. Statement by MR. JUSTICE MOORE.

This is a suit by Lella Knighton against Joseph W. Chamberlin and Rose W. Chamberlin, his mother, L. O. Herrold, and Epsie E. Herrold, his wife, to foreclose a mortgage on lots 11 and 12, in block 74, in North Salem Addition to Salem, Oregon, executed by Mr. Chamberlin to secure a promissory note which he and his mother gave June 21, 1913, to the plaintiff for $500, maturing in two years with 8 per cent interest, payable semi-annually, and providing for the payment of a reasonable sum in addition as attorney's fees if a suit was instituted to collect any part of the note. The complaint is in the usual form, alleges the payment of only three installments of $20 each as interest, and that $75 is a reasonable sum as attorney's fees.

The separate answer of Mr. Chamberlin and his mother admits most of the averments of the complaint and by way of cross-complaint for affirmative relief alleges in substance that about November 26, 1913, he entered into a contract with the defendant Mr. Herrold pursuant to which he conveyed the real property hereinbefore described to the latter, who agreed to assume and pay the mortgage on such premises, and Mr. Chamberlin also deeded a house and lot on Twentieth Street, Salem, Oregon, to the defendant Mrs. Herrold, then Miss Smith, who assumed and agreed to pay a mortgage thereon of $500, and in consideration thereof Mr. Herrold caused to be transferred the tools, machinery, etc., and his interest in a building used for housing motor vehicles and known as the "Salem Auto Garage," then subject to a mortgage of $500, the payment of which Mr. Chamberlin assumed and subsequently discharged; and that Mr. Herrold has failed to keep or perform his part of the agreement, except to pay the installments of interest. The prayer of the answer is that Mr. Herrold be decreed to have assumed and agreed to pay the plaintiff's mortgage; that he thereby became personally liable therefor, while Mr. Chamberlin and his mother are his sureties only; that in case of a deficiency upon a sale of the premises under a decree of foreclosure the plaintiff herein be required first to enforce her demand for such insufficiency against the property of Mr. Herrold before Mr. Chamberlin or his mother be required to pay any part of the same; that the latter have a decree against Mr. Herrold for the recovery of any sums, including costs, etc., that they may be obliged to pay the plaintiff, and for such other and further relief as to the court may seem just and equitable in the premises.

The answer of Mr. and Mrs. Herrold denies the material averments of the cross-complaint and for a defense thereto alleges that in November, 1913, the Salem Auto Garage was a corporation, and that the capital stock therein was then owned by Mr. Herrold, Miss Smith and Jack Melsom; that Mr. Herrold and Mr. Chamberlin entered into an oral agreement whereby such capital stock was transferred to the latter, who as part consideration therefor conveyed his equity only in and to the real property described in the plaintiff's mortgage to Mr. Herrold, and Mr. Chamberlin also conveyed to Miss Smith, now Mrs. Herrold, a like interest in and to the house and lot on Twentieth Street, Salem, Oregon; that at the time such transfers were made Mr. Chamberlin paid to Mr. Herrold the remainder of the consideration for such exchange of equities; and that the contract here set out is the only agreement ever entered into and the one mentioned in the cross-complaint.

These allegations of new matter were controverted by the reply of Mr. Chamberlin and his mother, and the cause being then at issue was tried, resulting in a decree as prayed for in the cross-complaint, except that only $50 was allowed as attorney's fees; and Mr. Herrold appeals. AFFIRMED.

For appellant there was a brief over the names of *Mr. James G. Heltzel, Mr. Ernest Blue* and *Mr. Donald W. Miles,* with an oral argument by *Mr. Heltzel.*

For respondents, Joseph Weller Chamberlin and Rose W. Chamberlin, there was a brief over the name of *Messrs. Smith & Shields,* with an oral argument by *Mr. Roy F. Shields.*

For respondent, Lella Knighton, there was a brief presented by *Messrs. Pogue & Page.*

MR. JUSTICE MOORE delivered the opinion of the court.

The only question involved is whether Mr. Herrold, as a part of the consideration for an exchange of the property transferred, orally agreed to assume and pay the plaintiff's mortgage. The testimony given at the trial shows that Mr. Chamberlin, who had for some time been engaged as an assistant in a surveyor's office, where he had seen deeds prepared for signature and acknowledgment, had no previous experience in drawing such sealed instruments and personally wrote the conveyances which he executed to Mr. Herrold and to Miss Smith. In each instance he stated in the deed that the premises were free from all encumbrances, except the plaintiff's mortgage for $500, and a mortgage for a like sum on the Twentieth Street house and lot, but he did not declare in either of such instruments that the grantee therein named assumed or agreed to pay the encumbrance mentioned. Mr. Chamberlin on direct examination in referring to Mr. Herrold testified as follows:

"I sold him these lots in controversy and a house and lot in East Salem, and told him there was a mortgage of $500 apiece on them, and he told me there was $400 ($500) against the garage; there was two notes left and the chattel mortgage on record in the courthouse against the tools and apparatus in the garage; and after talking it over he agreed to take these two lots and assume the mortgage, and house and lot and assume that mortgage, and I took over the garage and assumed the indebtedness against the garage. * *

"Q. How did you arrive at the purchase price to be paid for the garage?

"A. We took an invoice, and it amounted to $2,100. I had these lots in North Salem I valued at $1,000, with $500 mortgage; then the house was valued at $1,500,

with $500 mortgage; then I gave Mr. Herrold $100 credit on my books; that made $1,600. He had $2,100 in the garage and $500 indebtedness against it; so we came to amounts of about $1,600."

On cross-examination this witness was asked:

"Now, isn't it a fact, Mr. Chamberlin, that you nor Mr. Herrold never at any time talked about assuming each other's mortgages?" He answered: "No, that is not a fact; as I said before that was a part of the trade."

Mr. Herrold's testimony corroborates that of Mr. Chamberlin in respect to the inventory of the garage, the value of which was found to be $1,600 after deducting the mortgage.

This witness stated upon oath:

"I was to receive equities in these two pieces of property, and I was to clear the garage of all current indebtedness and was to receive all current bills due the garage at the time of the transfer. * *

"Q. When Mr. Chamberlin acquired the stock of the corporation, and others designated by him, did you require him to assume and agree to pay the mortgage against the property personally?

"A. I made no requirements of any kind; just transferred the stock with the understanding that that $500 mortgage was against the corporation.

"Q. At the time the deal was being talked about, and at the time it was finally closed up, did you assume the mortgages on these respective properties, or either of them?

"A. I did not. * *

"Q. Did you ever tell Mr. Chamberlin that you would assume the mortgage that was against lots 11 and 12 in block 74 of North Salem Addition to Salem, Oregon?

"A. No.

"Q. Did he ever ask you to assume and agree to pay his mortgage?

"A. No, sir.

"Q. Had that provision requiring you to assume and agree to pay that mortgage been put in this deed, Defendant's Exhibit 'A,' would you have accepted the deed?

"A. No, sir, not at all.

"Q. State any other matters connected with this transaction, terms of deed, and so on.

"A. Nothing except we were speaking of equities all the time in the trading, and he was telling me of his equities in the properties, and we went out to see them, these two and another, and at the time I rather doubted the wisdom on my part of taking the lots; I made some investigation and the equities seemed to be overvalued considerably, but I took the lots thinking I would be able to make some kind of a trade in a day or two or a month or two; it was my equity in the garage and his equity in the real estate that I was thinking of in the dealing all the time."

On cross-examination in referring to the encumbrance on the garage Mr. Herrold was asked:

"You had an understanding with Mr. Chamberlin that Chamberlin was to take care of the mortgage?

"A. The trade was made on that basis.

"Q. That Chamberlin was to take care of that mortgage?

"A. It was the consideration of the transfer.

"Q. And you didn't expect any further liability on your part?

"A. I did not."

It is impossible to reconcile the conflicting statements of these interested parties. The trial court having heard their testimony expressly found that Mr. Herrold agreed to assume and pay the plaintiff's mortgage and that Mr. Chamberlin also agreed to assume and pay the encumbrance on the garage. The finding so made is entitled to great weight, and a careful examination of the entire testimony when compared and considered in connection with the inferences

and presumptions deducible therefrom is not deemed sufficient to overturn the conclusion thus reached.

A verbal promise by a grantee of land to assume and pay a mortgage on the premises, if clearly established, is valid and may be enforced in equity: Jones, Mort. (7 ed.), § 750. The averments of the cross-complaint are sufficient to uphold the relief which was granted: *Hough* v. *Porter,* 51 Or. 377 (95 Pac. 732, 98 Pac. 1083, 102 Pac. 728).

In view of all the circumstances attending a transfer of the respective properties as disclosed by the evidence, it is believed a decree should be rendered foreclosing the mortgage as prayed for in the complaint, and also that the defendants Joseph Weller Chamberlin and Rose W. Chamberlin be awarded a recovery over against the defendant L. O. Herrold for any part of the sum they may be compelled to pay as a deficiency; and it is so ordered. AFFIRMED.

MR. CHIEF JUSTICE MCBRIDE, MR. JUSTICE BEAN and MR. JUSTICE MCCAMANT concur.

Submitted on brief April 24, reversed May 1, 1917.

SWANK *v.* BATTAGLIA.

(164 Pac 705.)

Sales—Implied Warranties—Articles of Food.

1. The doctrine of *caveat emptor* applies to a sale of potatoes by a wholesaler to a retail dealer in the absence of deceit or misrepresentation, so that, where the external appearance of the potatoes indicated soundness and good quality, it was no defense to an action for the price that they were affected with dry rot and had been condemned.

Food—Sale of Diseased Food.

2. Section 2227, L. O. L., making the sale of diseased food a criminal offense, is not designed to punish persons innocently selling

diseased food products where the defects are latent and not known at the time of the sale.

[As to liability of manufacturer to person injured by unwholesome food, see note in 111 **Am. St. Rep.** 713.]

From Multnomah: GEORGE N. DAVIS, Judge.

Action by W. I. Swank against A. Battaglia, in which plaintiff obtained a judgment and defendant appeals. Reversed. Judgment rendered.

In Banc. Statement by MR. CHIEF JUSTICE MCBRIDE.

This is an action to recover the purchase price of 100 sacks of potatoes sold to the defendant at the agreed price of $1.13 a sack.

The answer admits the sale and delivery of the goods, but alleges that both the plaintiff and defendant are dealers engaged in selling fruit and vegetables; that the potatoes were sold to defendant for the purpose of resale as food to the citizens of Portland; that the potatoes were infected with dry rot and unfit for food, a fact of which defendant was ignorant when he purchased them, and that they were inspected by the food inspector of the City of Portland and found to be unfit for human food and condemned; that the portion which defendant had sold was returned to him and he was compelled to make good the purchase price to his customers, and that the quantity remaining on hand was sold for $18.50 for hog feed. The case being put at issue by appropriate denials the court made the following findings of fact:

"1. That on or about the 23d day of May, 1916, at Portland, Multnomah County, Oregon, the plaintiff sold and delivered to defendant, at his special instance and request 100 sacks of potatoes, at the agreed price of $1.13 per sack, for the purpose of use as human food.

"2. That the contract sale price of 100 sacks of potatoes based on the agreed price of $1 13 per sack amounted in the aggregate to $113, no part of which has been paid.

"3. That said potatoes so sold and delivered were affected by the disease known as 'Fusarium Wilt' or dry rot, and by reason thereof were unfit for human food.

"4. That said defect was not apparent upon casual inspection but became apparent only upon cutting or cooking said potatoes, and was not discovered until after said sale and delivery.

"5. That about five days after said sale and delivery said potatoes were condemned by the market inspector of the City of Portland, Oregon, and by the inspector of the State Horticultural Bureau of the State of Oregon, as being affected with Fusarium Wilt or dry rot and unfit for human food, notice thereof being given by said officers to both plaintiff and defendant.

"6. That said defendant prior to such condemnation had sold 30 sacks of said potatoes for purposes of human food; that all but a few sacks of said potatoes so sold were returned to defendant by his customers as unfit for human food, and the purchase price refunded by defendant to such customers.

"7. That the condemned potatoes and the potatoes returned to defendant were, by permission of said inspectors, sold as hog feed; that the total sum realized by defendant from such sale and from those not returned to him was $31."

As a conclusion of law the court found that there was an implied warranty that the potatoes were fit for human food and that plaintiff was entitled to judgment for only $31, the price received for potatoes sold to customers and not returned plus the amount received for those sold for hog feed. There was a judgment for plaintiff upon these findings for the sum of $31, from which he appeals.

Submitted on brief under the proviso of Supreme Court Rule 18: 56 Or. 622 (117 Pac. xi).

REVERSED. JUDGMENT RENDERED.

For appellant there was a brief over the name of *Mr. Charles M. Hodges.*

For respondent there was a brief presented by *Messrs. Johnson & Mathews.*

Opinion by MR. CHIEF JUSTICE MCBRIDE.

There is but one question in this case, namely, whether there is any implied warranty of the quality of the goods sold under the circumstances disclosed here, no actual warranty being pleaded or proved. So far as the quality of goods purchased is concerned the rule of *caveat emptor* usually applies, unless there is deceit or misrepresentation, which is not the case here. The external appearance of the potatoes indicated soundness and good quality. It was only when they were sliced for cooking that the defect became visible, and there is nothing in the evidence indicating that plaintiff knew of their unsoundness. The defendant testified:

"They looked pretty good; they looked pretty nice from looking at them."

So the case simmers down to this: The plaintiff sold the potatoes to defendant and defendant purchased them, each supposing them to be sound and having reason to believe they were so. There is authority for the holding that where provisions are sold to a customer at retail for immediate use, there is an implied warranty that they are reasonably fit for food: Benjamin on Sales (7 ed.), p. 661, and cases there cited. But in sales to dealers the rule is different.

In such instances the rule of *caveat emptor* is applied: *Howard* v. *Emerson,* 110 Mass. 320 (14 Am. Rep. 608); *Wiedeman* v. *Keller,* 171 Ill. 93 (49 N. E. 210); *Giroux* v. *Stedman,* 145 Mass. 439 (1 Am. St. Rep. 472, 14 N. E. 538); *Ryder* v. *Neitge,* 21 Minn. 70; *Moses* v. *Mead,* 1 Denio (N. Y.), 378 (43 Am. Dec. 676); *Warren* v. *Buck,* 71 Vt. 44 (76 Am. St. Rep. 754, 42 Atl. 979); *Hanson* v. *Hartse,* 70 Minn. 282 (68 Am. St. Rep. 527, 73 N. W. 163); *Humphreys* v. *Comline,* 8 Blackf. (Ind.) 516. The case of *Howard* v. *Emerson,* 110 Mass. 320, is typical of all those above cited. In that case Howard, a farmer, had sold to Emerson, a butcher and dealer in provisions, a cow which Emerson purchased for the purpose of butchering and retailing to his customers. The flesh was found unfit for food, and the purchaser refused to pay for her, and suit was brought to recover the purchase price. The court said:

"The general rule of the common law is that, upon a sale of goods, if there is no express warranty of the quality of the goods sold, and no fraud, the maxim *caveat emptor* applies, and no warranty is implied by law. *Winsor* v. *Lombard,* 18 Pick. (35 Mass.) 57; *Mixer* v. *Coburn,* 11 Metc. (52 Mass.) 559 (45 Am. Dec. 230); *French* v. *Vining,* 102 Mass. 132 (3 Am. Rep. 440). The defendants contend that when articles of food are sold for immediate domestic use there is an implied warranty or representation that they are sound and fit for food, and that the case at bar falls within this exception to the general rule *Van Bracklin* v. *Fonda,* 12 Johns. (N. Y.) 468 (7 Am. Dec. 339). But we think that this exception, if established, does not extend beyond the case of a dealer who sells provisions directly to the consumer for domestic use. In such cases it may be reasonable to infer a tacit understanding, which enters into the contract, that the pro-

visions are sound. The relation of the buyer to the seller and the circumstances of the sale may raise the presumption that the seller impliedly represents them to be sound. But the same reasons are not applicable to the case of one dealer selling to another dealer; and we think the rule is settled that in the sale of provisions, in the course of general commercial transactions, the maxim *caveat emptor* applies, and there is no implied warranty or representation of quality or fitness. *Emerson* v. *Brigham,* 10 Mass. 197 (6 Am. Dec. 109); *Winsor* v. *Lombard,* 18 Pick. (35 Mass.) 57; *Hart* v. *Wright,* 17 Wend. (N. Y.) 267; *Wright* v. *Hart,* 18 Wend. (N. Y.) 449; *Moses* v. *Mead,* 1 Denio (N. Y.), 378 (43 Am. Dec. 676); *Burnby* v. *Bollett,* 16 M. & W. 644. In the case at bar the plaintiff was a farmer and the defendants were butchers and dealers in provisions for immediate use as food. The fact that the plaintiff knew the purpose for which the defendants purchased the cow would not render him liable, upon an implied warranty, for unknown defects which made her unfit for that purpose. A warranty of fitness may be implied in contracts to manufacture or in executory contracts to sell, but it is not implied in executed sales of specific chattels. *Chandelor* v. *Lopus,* 1 Smith's Lead. Cas. (5th Am. ed.) 238, and notes."

The cases last above cited seem to settle the law against the contention of the plaintiff in the instant case.

Counsel for plaintiff cite *Morse* v. *Union Stockyard Co.,* 21 Or. 289 (28 Pac. 2, 14 L. R. A. 157), and *Kitchin* v. *Oregon Nursery Co.,* 65 Or. 20 (130 Pac. 408, 1133, 132 Pac. 956), as holding a contrary view, but when properly analyzed it will appear that this contention is unfounded. In the former case the buyer requested the seller to send him two carloads of "good beef cattle." The seller shipped him two carloads of cattle unfit for beef. Where articles of a particular descrip-

tion are ordered, there is an implied warranty that those furnished answer that description, and that is what the holding in the case cited amounts to. If A requests B to send him a herd of cows for milking purposes, and B sends him a herd of Hereford steers fit only for beef, it stands to reason that he should not recover for the price of cows. Whether we treat the case as a breach of an implied warranty or a failure to perform the result is the same. In such a case there is *prima facie* evidence of fraud on the part of the seller. The fitness of the cattle for beef could be known to the seller upon inspection of the cattle before he shipped them, and could not be known to the buyer, if, as in the case cited, he resided at a distance until they were received. Under these circumstances, and where the buyer paid for the cattle before he received them, relying upon the judgment and good faith of the seller as to their quality, the court very properly held that he could recover damages. Here there was no stipulation as to quality, and no bad faith on the part of the seller, who believed and had a right to believe that the potatoes sold were sound and free from disease. In the case of *Kitchin* v. *Oregon Nursery Co.*, 65 Or. 20 (130 Pac. 408, 1133, 132 Pac. 956), the statement of the case in the opinion is not full, but an inspection of the record shows the complaint alleged that plaintiff was induced to purchase by reason of certain advertisements put out by defendant to the effect that it dealt only in "reliable nursery stock," and that all trees grown by it were strong, vigorous, healthy trees, whereas the trees furnished were not such, and that defendant knew they were not. There was an element of fraud and misrepresentation charged in that case which is entirely lack-

ing here. Mr. Justice EAKIN in discussing the doctrine of implied warranty by reason of an article being ordered for a particular purpose expressly waives its application to the case there under consideration:

"The principal contention of plaintiff is as to the liability of defendant upon its implied warranty that the articles sold shall be suitable for the purposes to which they are to be applied. This rule is well recognized by this court: *Gold Ridge Min. Co.* v. *Tallmadge*, 44 Or. 34 (74 Pac. 325, 102 Am. St. Rep. 602); *Lenz* v. *Blake*, 44 Or. 569, 573 (76 Pac. 356, 357); *Mine Supply Co.* v. *Columbia Min. Co.*, 48 Or. 391, 395 (86 Pac. 789, 790). However, in this case it is not necessary to apply the rule because the plaintiff is not only contending that the trees were not suitable for the use to which they were to be applied, but that the trees were not sound. Defendant admits that it is bound by an implied warranty to that extent, namely, that the trees were sound and healthy, and the testimony strongly tended to establish the fact that the trees were not sound, but were unhealthy trees having an inherent defect which caused them to die."

It may also be added in that case the defendant was a large grower of nursery stock selling the same at wholesale to dealers as well as at retail and might well be included within the reasoning of that line of cases which hold that there is an implied warranty by the manufacturer of articles that they are free from latent defects, but it is not necessary to consider that phase of the question in the case at bar.

Another suggestion of counsel for plaintiff is that no recovery can be had because the contract is illegal in that it was in violation of Section 2227, L. O. L., which makes the sale of diseased food a criminal offense; but we do not think it was the intent of that section to punish persons innocently selling diseased

food products where the defects are latent and not known at the time of the sale. In the sale of liquor to minors and like offenses, it has been held that ignorance of the age of the purchaser is no defense to a prosecution for such sale; but this rule arises from the theory that dealing in such merchandise is at best an authorized nuisance in which the dealer must engage at his peril. On the contrary, the sale of food is a business beneficial to the community and one that should be encouraged, and a dealer will not be held to have violated a law against selling diseased food unless the pernicious character of such food was known to him or he disregarded such obvious precautions in inspecting it as would be equivalent to such intent, which is not the case here.

There is neither pleading, finding nor testimony to sustain the judgment rendered in this case, and the judgment of the Circuit Court will be reversed and one entered here in accordance with the prayer of the complaint. REVERSED. JUDGMENT RENDERED.

Submitted on brief June 30, 1916, reversed May 1, 1917.

SUMPTER *v.* ST. HELENS CREOSOTING CO.

(164 Pac. 708.)

Compromise and Settlement—Effect.

1. There is an account stated and settlement barring action for overtime, where an employee each month signs a time check stating amount of time and amount due, and receives payment without protest or objection.

[As to accounts stated and what are construed to be such, see note in 136 **Am. St. Rep.** 39.]

From Columbia: JAMES A. EAKIN, Judge.

This is an action by James L. Sumpter against the St. Helens Creosoting Company, a corporation, for labor. From a directed verdict in favor of plaintiff, defendant appeals. Reversed. Judgment entered for defendant.

In Banc. Statement by MR. JUSTICE BENSON.

In the month of April, 1915, plaintiff began this action to recover the sum of $163.12½ claimed to be due for labor. The substance of the complaint is that from July 1, 1913, to September 27, 1914, plaintiff performed services for defendant as an assistant engineer "at an agreed compensation therefor of $75 per month, or $2.50 per ten hour day, or $0.25 per hour." It is further alleged that he worked in excess of ten hours a day but less than 13 hours daily, and that such overtime aggregated 435 hours for which he claims compensation at the rate of $0.37½ per hour.

Defendant demurred to the complaint contending that the ten-hour law upon which plaintiff's cause of action is based is unconstitutional. This contention having been overruled an answer was filed which, after some denials, pleads affirmatively an accounting, settlement and payment from month to month as plaintiff's wages became due. One of these pleas, being illustrative of all the others, is as follows:

"That on August 9, 1913, defendant had an accounting with plaintiff for the month of July, paying plaintiff in full for his services for said month of July the sum of $75.00 which sum was accepted by plaintiff in full payment and settlement of all wages for said month of July, as evidenced by a certain instrument of writing, of which the following is a substantial copy, to wit:

Name J. L. Sumpter		Check No. 950	No. 683
has worked as			
Engineer Helper		TIME CHECK	
Month of July No. 17			
31 days at	75.00	St. Helens Creosoting Company	
days at		St. Helens, Ore.	
days at		August 9, 1913	191
Total	75.00	Received from St. Helens Creo-	
Deductions		soting Company, $74.00	
Hospital 1		Seventy-four and no-100 Dollars	
Board		in full for all labor to date.	
Store		C. D. Golden, Timekeeper.	
Total Deductions 1		J. L. Sumpter	
		(Sign here)	
Balance due	74.00	Not transferable."	

A reply was filed consisting of a general denial and at the close of the evidence both parties moved for a directed verdict, and the court having directed a verdict for plaintiff, defendant appeals.

Submitted on brief under the proviso of Supreme Court Rule 18: 56 Or. 622 (117 Pac. xi).

REVERSED. JUDGMENT ENTERED FOR DEFENDANT.

For appellant there was a brief over the name of *Mr. George M. McBride.*

For respondent there was a brief over the name of *Mr. Glen R. Metsker.*

MR. JUSTICE BENSON delivered the opinion of the court.

In his brief defendant urges with vigor that the act of the legislature known as the ten-hour law, Laws 1913, p. 169, is unconstitutional, but that contention has been finally disposed of by this court in the case of *State* v. *Bunting,* 71 Or. 259 (139 Pac. 731, Ann. Cas. 1916C, 1003), which decision has recently been affirmed by the Supreme Court of the United States in *Bunting* v. *Oregon,* in an opinion of April 9, 1917.

We come then to a consideration of the action of the trial court in directing a verdict for the plaintiff. Section 2 of the ten-hour law reads thus:

"No person shall be employed in any mill, factory or manufacturing establishment in this state more than ten hours in any one day, except watchmen and employees when engaged in making necessary repairs, or in case of emergency, where life or property is in imminent danger; *provided, however,* employees may work overtime not to exceed three hours in any one day, conditioned that payment be made for said overtime at the rate of time and one-half the regular wage."

Section 3 of the act declares that any violation of its provisions by an employer is a misdemeanor punishable by fine and that each day's violation of any part of the act shall be a separate offense.

The entire evidence in the case consists of the testimony of the plaintiff, the monthly time-checks, of which an example is above set out, and the corresponding pay-checks for the several months. It appears from the plaintiff's testimony that his contract of employment was oral; that he began his employment as an assistant engineer about February 28, 1913; that he was to receive $75 per month and was to go to work at 7 o'clock at night; that nothing was said as to the number of hours he was to work each day; that there were a night shift and a day shift; that the rule was for him to work two weeks on the night shift, and then two weeks on the day shift; that the day shift was generally about eleven hours, and the night shift twelve hours; and that occasionally he worked for an entire month on the night shift. He says that he received his pay each month at the rate of $75 and signed the time-checks each time and made no pro-

test or objection to the account as therein stated; that he did not work overtime after September 27, 1914, and never made any demand for additional pay until and except when his attorney made a formal demand therefor preparatory to commencing this action which was begun in April, 1915. It may also be noted that the same day when the monthly account was presented as above set out, he was paid by a check containing a duplicate of the account and indorsed as follows: "Endorsement. Received the within check in full payment and satisfaction of the items listed thereon. (Signed) Payee—J. L. Sumpter." It appears to us that this state of the pleadings and the evidence establishes beyond any question that there was an account stated and a settlement which constitutes a bar to this action. Plaintiff argues that such a conclusion is calculated to render the statute ineffective, but we cannot agree with this contention. The law provides for a remedy in the shape of a criminal prosecution, but it nowhere prohibits the laborer from waiving his civil remedy after the labor is performed. It must be conceded that there is no power to compel plaintiff to prosecute this action and neglect to do so would be a complete waiver. An accounting and settlement is another way of reaching the same result. We conclude that the defendant was entitled to a directed verdict, and a judgment will accordingly be entered here in its favor.

REVERSED. JUDGMENT ENTERED FOR DEFENDANT.

MR. CHIEF JUSTICE MCBRIDE did not participate in the consideration or decision of this case.

Argued April 18, reversed and remanded with directions May 1, 1917.

ALEXANDER *v.* SCHOOL DISTRICT No. 1.

(164 Pac. 711.)

Schools and School Districts—Contract With Teacher—Transfer—Authority of Board—Statute.

1. Laws of 1913, page 69, Section 1, empowers the board of directors of every school district to hire and discharge teachers and to fix their compensation. Section 2 provides that the word "teacher" shall include supervisors and principals and instructors who are in the employ of the school district. Section 4 provides that teachers who have been regularly employed for not less than two successive annual terms shall be placed on the list of permanently employed teachers. Section 5 provides that permanently employed teachers shall not be subject to annual appointment, but shall continue to serve until dismissed in the manner therein provided, and that they shall serve in such positions and be subject to such assignments and transfer as the board may from time to time determine. Section 6 provides that before any permanently employed teacher can be dismissed notice must be given containing the charges against the teacher and a hearing had thereon if the teacher so requests. *Held*, that the transfer of a teacher who had been acting as principal to another school where she was an instructor merely was not a dismissal of the teacher, and was within the discretion of the board without a necessity for notice and hearing on charges.

Officers—Employment of Teacher—"Office."

2. A teacher permanently employed under Laws 1913, page 70, Section 4, does not hold an office, since the statute refers to it as an employment, and Article XV, Section 2, of the Constitution, prohibits the legislature from creating any office the tenure of which shall be longer than four years.

[As to school officer or teacher as municipal officer, see note in Ann. Cas. 1914D, 1236.]

Mandamus—Subjects of Relief—Restoration to Office.

3. Where an officer has been removed and another appointed to perform the work, *mandamus* is not the proper remedy of the discharged officer, since *quo warranto* is the proper method for trying title to an office.

Mandamus—Issues—Competency of Teacher—Transfer.

4. In *mandamus* proceedings to compel a school board to restore a teacher to her former position as principal, where the transfer of the teacher was within the board's discretion, the court cannot consider whether her services as principal were satisfactory.

From Multnomah: CALVIN U. GANTENBEIN, Judge.

Proceeding in *mandamus* by Alevia Alexander against School District No. 1, in Multnomah County,

a municipal corporation, and District School Board for said School District No. 1, composed of the following duly elected, qualified and acting members, viz.: Allan Welch Smith, O. M. Plummer, J. V. Beach, J. Francis Drake, S. P. Lockwood and L. R. Alderman, administrative officer, in which the writ was made peremptory, and defendants appeal. Reversed and remanded with directions to dismiss the writ.

In Banc. Statement by MR. JUSTICE BURNETT.

This is a *mandamus* proceeding where the writ required the defendants, constituting the board of directors of School District No. 1 of Multnomah County, to restore the plaintiff to the position which she formerly held as teacher in the schools there, or to one of like character, duties and salary, or to show cause why they had not done so. Stripped of tautological verbiage and condensed to its lowest terms the writ states substantially that for eight years prior to its issuance the petitioner had been continuously employed as a teacher in the schools of that district by the school board thereof, and for the last six of those years had occupied the position of principal; that on August 17, 1916, the defendants transferred her to the station of assistant teacher where she was required to teach history; that this action was taken without notice to her and without her consent; that she demanded restoration and the same was refused.

A general demurrer to the writ was overruled. The defendants answered avowing the action taken and claiming that it was justified by the statute, besides averring matter designed to show that her service in her former assignment was not satisfactory.

The reply traversed the new matter in the answer. A trial before the court resulted in making the writ peremptory, and the defendant appealed.

REVERSED AND REMANDED WITH DIRECTIONS.

For appellants there was a brief over the name of *Messrs. Fulton & Bowerman,* with an oral argument by *Mr. Charles W. Fulton.*

For respondent there was a brief over the names of *Messrs. Clark, Skulason & Clark* and *Mr. Franklin F. Korell,* with oral arguments by *Mr. Alfred E. Clark* and *Mr. Korell.*

MR. JUSTICE BURNETT delivered the opinion of the court.

The issue requires a construction of the act of February 7, 1913, entitled "An Act to provide for the employment and discharge of teachers, officers, and other employees in school districts now having or which at any time hereafter shall have a population of 20,000 or more persons": Laws 1913, p. 69.

Section 1 of that law empowers the board of directors of every school district in this state now having or which at any time hereafter shall have a population of 20,000 or more persons to appoint and remove, hire and discharge all teachers, officers, agents and employees as it may deem necessary, and to fix their compensation. Other parts read as follows:

Section 2. "The word 'teacher' or 'teachers' as used in this act shall include supervisors and principals and instructors who are in the employ of the school district or districts specified in this act."

Section 4. "Teachers who have been employed in the schools in any such district or districts as regularly appointed teachers for not less than two succes-

sive annual terms shall by the board of directors be placed upon the list of permanently employed teachers."

Section 5. "Teachers so placed upon such list shall not be subject to annual appointment, but shall continue to serve until dismissed or discontinued in the service by the board in the manner herein provided, subject to the rules of the board concerning suspensions, but such rules shall be reasonable and for the good of such schools. They shall serve in such positions and shall be subject to such assignments and transfer as the board may from time to time determine, or as may be provided for in its rules."

Section 6. "Before being dismissed any teacher on the permanent list shall receive written notice, stating the reason for the proposed dismissal, together with a copy of any charges or complaints which may be filed against him or her, and upon written request filed with the clerk the teacher shall be entitled to and given a hearing before the board within ten days after said notice, with full benefit of witnesses and subpoenas issued in blank by and over the hand of the clerk therefor and the right to be represented by counsel. * * "

Sections 7, 8 and 9 relate to procedure in dismissal of teachers.

Section 10. "All teachers who shall have been employed in such district or districts two or more years prior to the first day of July, 1913, shall be eligible to re-election as permanent teachers, and all such teachers who shall be re-elected for employment by the board for the school year beginning in September, 1913, shall be permanent teachers under the provisions of this act."

Section 11. "All acts and parts of acts in conflict herewith are hereby repealed. Provided, however, that all general laws of this state relating to public schools shall be applicable to districts under this act except in so far as the same may be in conflict with the provisions hereof."

The writ shows that the plaintiff was properly on the list of "permanently employed teachers." The act does not give any rank or preference to teachers. Principals, instructors and supervisors are all included within the term "teachers." They are thus on a common level, without distinction or precedence under the enactment. They have the privilege of serving until dismissed or discontinued subject to the rules of the board concerning suspensions; but, on the other hand, when employed by the board or when automatically installed as permanent employees, they assume the burden imposed by the statute of serving "in such positions and shall be subject to such assignments and transfer as the board may from time to time determine, or as may be provided for in its rules." This is not a case of dismissal, discontinuance or suspension, which must be preceded by notice and an opportunity to be heard. The writ shows that the plaintiff is still a teacher and that she has been assigned to active service in a certain school, different it is true from the one in which she had been previously employed, but not in derogation of her standing as an instructor. There is no pretense that she is not competent to teach the subject assigned to her and that therefore she has been set at an impossible task. The contention for the plaintiff is that her transfer to another school at a less salary constitutes dismissal. The only authorities cited for that doctrine come from New York, New Jersey and California. In all of them the statute protected the incumbent in a certain particular position. It contained no such provision as in our enactment requiring teachers to serve where they are placed by the board. For instance, in *People* v. *Board of Education,* 174 N. Y. 169 (66 N. E. 674), the issue arose out of consolidating the cities of New

York and Brooklyn. The statute accomplishing this result specially confirmed the teachers in the public schools in their several positions, and it was held that even a transfer of a teacher to another place in the public schools could not be effected without an opportunity to be heard as provided by the charter of amalgamation. The New Jersey cases of which *Machaelis* v. *Board of Fire Commissioners,* 49 N. J. L. 154 (6 Atl. 881), is the controlling one, depend upon a statute treating the position as an office to be held by the incumbent and from which he cannot be ousted except by regular process. The California cases, of which *Kennedy* v. *Board of Education,* 82 Cal. 483 (22 Pac. 1042), is the leading one, treat the matter as though the teacher in question was elected to a specified position as to an office. Those precedents have been doubted and strongly limited by the subsequent decisions of the Supreme Court of our adjoining sister state. They are not applicable in the present juncture because the position held by the plaintiff is not an office. In the words of the statute she is "permanently employed."

Moreover, the position being permanent, it cannot be classed as an office, because the Constitution in Section 2 of Article XV declares that "the legislative assembly shall not create any office the tenure of which shall be longer than four years." Even then, on the hypothesis that the place is an official station, the writ having disclosed that the plaintiff's former work was confided to another, *quo warranto* and not *mandamus* is the proper method of trying title to an office.

The statute is part of the employment of all teachers. The language is plain making them subject to the direction of the board about the position in which

they shall serve. They are not entitled to notice or previous trial on the subject. As to that the statute as enacted in 1913 requires them to hear and obey. In that respect, so far as disclosed by the writ the directors are still supreme in their management of the affairs of their district. The legislation in question is in the nature of an exception to the general rule about the function of the directorate, and if the plaintiff would have the relief which she seeks, she must bring herself clearly within the exception. What may be said to be a legislative construction of the law of 1913 will be found in Chapter 152 of the Laws of 1917, which amends the enactment of 1913 so as to require notice and a hearing for the transfer of a teacher to another position in the schools of the same district. If the position assumed by the plaintiff is correct under the statute of 1913, the legislation of 1917 on the same subject would have been superfluous. In brief, the plaintiff has no title to any particular position in the schools of the defendant district to which she may be restored as to an office. She showed herself to be nothing more than an employee who is bound by the law of her employment to serve where she is directed.

It was not apropos to the present proceeding to inquire whether her services in her former place were satisfactory or not. Those questions could have been taken up if there had been charges preferred against her, and the matter was properly before the court on appeal or review or otherwise. The present contest is one in which the plaintiff must show a clear right to the relief demanded without regard to the discretion of the defendants, and we cannot try out here the issue of the excellence of her conduct or any objections thereto. The demurrer to the writ should have been

sustained and the whole contention settled in that manner. The judgment of the Circuit Court is therefore reversed and the cause remanded to that tribunal, with directions to sustain the demurrer and dismiss the writ.

REVERSED AND REMANDED WITH DIRECTIONS.

MR. JUSTICE BENSON took no part in the consideration of this case.

Argued April 17, affirmed May 1, 1917.

COURTS v. CLARK.

(164 Pac. 714.)

Bailment—Repairs on Automobiles—Liens—"Automobile Repairer."

1. Under Section 7497, L. O. L., providing that every automobile repairer who has expended labor, skill and materials at the request of the owner, reputed owner or authorized agent shall have a lien on the automobile for the contract price of the expenditure, although he has surrendered possession of the car, a tire seller who employed men to set tires which he sold and who set new tires sold to the reputed owner of an automobile was an "automobile repairer," and was entitled to a lien; the tire being essential to the complete machine.

[As to lien on automobile for repairs or storage, see note in Ann. Cas. 1916A, 630.]

Bailment—Repairs to Automobile—Liens—Sufficiency of Possession.

2. Where the reputed owner of an automobile left it with a seller of tires to have a new tire attached and went about his business for a short time, the repairer's possession was of sufficient duration to entitle him to a lien under Section 7497, L. O. L.

From Multnomah: ROBERT G. MORROW, Judge.

Suit by Albert Courts, doing business as the Peerless Tire & Rubber Company, against T. E. Clark and Mitchell, Lewis & Staver Company, a corporation, to foreclose a lien for repair work performed upon an automobile. There was a decree in accordance with the prayer of the complaint and defendants appeal. Affirmed.

Department 2. Statement by MR. JUSTICE MOORE.

This is a suit to foreclose an alleged automobile repairer's lien. The cause being at issue was tried and findings of fact were made to the effect that at all the times stated therein the plaintiff, Albert Courts, was engaged in business at Portland, Oregon, under the legally assumed name of the Peerless Tire and Rubber Company, selling and repairing automobile tires, and for that purpose kept qualified employees, who removed from motor vehicles old tires and put on new ones; that when such alterations were required by the proprietor or reputed owner of an automobile to be made by the plaintiff, the car would be taken to and for a short time left upon the street in front of his place of business, where his employees raised the end of an axle, removed the bolts, and pried the old tire from the retaining rim, scraped the rust therefrom, attached the new tire, and inflated the inner tube, which service was the only repair work performed by the plaintiff; that on March 16, 1915, and on the 12th of the succeeding month, respectively, the defendant T. E. Clark was in possession and the reputed owner of a Mitchell touring car, particularly describing it, which automobile he drove to the plaintiff's place of business, and on each occasion requested that an old tire be removed from a hind wheel and a new rubber casing and inner tube be attached; that such orders were complied with in Clark's absence and the work was performed in the manner indicated at a total expense of $115.45, which sum was not paid but entered upon the plaintiff's books without any charge being made for the services of his employees; that the automobile referred to had been sold upon the installment plan to Clark by the defendant the Mitchell, Lewis & Staver Company, a corporation, which retained the title to

the car until the purchase price thereof was paid; that no part of the alleged repairing charge having been liquidated a lien notice was filed and this suit instituted within the time limited therefor; and that in perfecting the lien the plaintiff had incurred an expense of $2.45, giving the items thereof, and was entitled to $25 as a reasonable attorney's fee for foreclosing the lien. As conclusions of law the court also found that the prayer of the complaint should be granted, and having rendered a decree in accordance therewith the defendants appeal. AFFIRMED.

For appellants there was a brief submitted without argument by *Messrs. Stapleton & Conley.*

For respondent there was a brief and an oral argument by *Mr. M. O. Wilkins.*

MR. JUSTICE MOORE delivered the opinion of the court.

The statute giving the security designed to be afforded in such a case reads:

"Every * * automobile repairer * * who has expended labor, skill, and materials on any chattel at the request of its owner, reputed owner, or authorized agent of the owner, shall have a lien upon said chattel for the contract price of such expenditure * * notwithstanding the fact that the possession of such chattel has been surrendered to the owner thereof": Section 7497, L. O. L.

It is contended: (1) That the plaintiff, within the language of the enactment, is not an automobile repairer; (2) that he did not expend any labor, services or skill upon the car; (3) that the automobile was never in his possession so as to be the basis of a lien; and (4) that the right to such security is given only

when materials used in repairing a motor car have been furnished in connection with the performance of labor, and then only as an incident to such service. The section of the statute under consideration was amended February 9, 1917, so as to give a lien to any person who furnished an automobile tire at the request of the owner or reputed owner of a motor vehicle: Laws 1917, Chapter 72. The latter enactment is evidently a legislative interpretation that the prior statute did not grant a lien to any person who merely furnished an automobile tire when no labor, skill, or service was employed in attaching it to the wheel of a car. If that construction were adopted, it is believed the services rendered by plaintiff's employees, as found by the court and hereinbefore stated, constituted the performance of such labor and skill as was contemplated by the statute as a prerequisite to the lien, though no separate charge was made for the work which was accomplished. Whether an automobile tire when thus attached is a part of the car for the purpose of securing the benefits of a statutory lien for the labor so furnished and the material thus supplied is to be determined by an affirmative answer to the inquiry, Is the tire essential to the completeness of the vehicle for the purpose for which it was designed? *Griggs* v. *Stone,* 51 N. J. L. 549 (18 Atl. 1094, 7 L. R. A. 48). Common experience teaches that no automobile, planned to be used with flexible tires, can be driven uninjured any great distance over a rough surface without such cushioned protection to its wheels. When, therefore, an automobile tire has been injured, the car of which it forms a part needs to be restored, and any person who, being engaged in that business, patches the rent or furnishes a new tire and performs the labor necessary to put on and fasten the casing to the wheel of the car,

is an automobile repairer within the meaning of the term as used in the statute and is entitled to the benefits of the lien thus given. Though no separate charge was made by the plaintiff therefor, he caused his employees to expend labor, services and skill upon the car in repairing it by prying off the old tire and putting on the new.

It will be remembered that on the occasions referred to the defendant Clark left the car in the street in front of the plaintiff's place of business, and was absent when the repairs were made to the wheel. While he was away, at least, the plaintiff had such possession of the vehicle as to entitle him to a lien, though the custody of the automobile was surrendered, when the repairs were made, to the reputed owner. The tires were supplied by the plaintiff in connection with the labor which he caused to be performed in making the repairs, and such being the case, no error was committed in declaring the validity of the lien or in foreclosing the security thus given.

It follows that the decree should be affirmed, and it is so ordered. AFFIRMED.

MR. CHIEF JUSTICE MCBRIDE, MR. JUSTICE BEAN and MR. JUSTICE MCCAMANT concur.

Argued April 13, affirmed May 1, 1917.

FRY v. CITY OF SALEM.

(164 Pac. 715.)

Municipal Corporations—Street Improvement—Notice by Recorder—City Charter.

1. Under Salem City Charter, Section 26, providing that the city council shall, by resolution, determine the portion of a street to be improved, and that notice to property owners must be given by the recorder by order of the council, and must specify with convenient certainty the street or part thereof proposed to be improved, the recorder is not empowered to determine what part of a street shall be improved, and any notice of street improvement given by the recorder, without the sanction of the city council, is not effective, so that a notice given by the recorder, leaving out part of the street determined to be improved by the council, was not good as to the owners adjacent to the portion of the street included in the recorder's notice.

Municipal Corporations—Street Improvement—Error in Recorder's Notice—Cure.

2. Where a reference in the recorder's notice to the plans and specifications for the improvement of the street, correctly describing the extent to be improved, was made as a means to ascertain the details and kind of improvement, not to contradict or delineate the description of the portion of the street determined to be improved, the erroneous description of the extent of the street to be improved in the recorder's notice was not cured.

Municipal Corporations — Street Improvement — Validity of Assessment—Notice—City Charter.

3. Under Salem City Charter, Section 26, requiring ten days' notice of intention to improve a street be given to property owners, where the notice of a street improvement published by the recorder, under direction of the city council, failed to describe correctly the portion of the street affected, omitting a certain extent thereof, the notice did not confer power or jurisdiction upon the common council to take subsequent proceedings for the improvement of the street as originally determined by it, nor to assess the costs against any of the abutting property, and its assessment was invalid.

From Marion: WILLIAM GALLOWAY, Judge.

This is a suit by Daniel J. Fry and Nettie E. Fry to quiet title against the City of Salem, and to free plaintiff's property from an alleged illegal assessment and lien for a street improvement. From a decree in favor of plaintiffs, the city appeals. Affirmed.

Department 1. Statement by MR. JUSTICE BEAN.

This is a suit to quiet title involving the validity of an assessment upon the plaintiffs' property for a street improvement. From a decree in favor of plaintiffs, defendant city appeals.

The following proceedings appear from the record: On April 1, 1912, the common council of the City of Salem, Oregon, a municipal corporation, adopted resolution No. 781, directing the city engineer to prepare plans, specifications and estimates for the improvement of South High Street from the south line of Mill Street to the south line of Bush Street, for more than two kinds of appropriate improvements, at least one of which was to be of a nonpatentable kind; and to estimate the probable cost of each class of improvement. On the same date the city engineer as directed filed with the city recorder plans, specifications and estimates for the improvement mentioned, which were approved by the city council by resolution No. 805, adopted by it on April 8, 1912, in which it declared its purpose and intention of making the said improvement, determined the portion of the street to be improved, and authorized and directed the recorder to give notice by publication for not less than five successive days in a daily newspaper published in the city, inviting bids for making the improvement. About April 12, 1912, the city recorder caused a notice as directed by the council to be published for six successive days in the "Daily Oregon Statesman," a daily newspaper of general circulation, published in the City of Salem. The notice is set forth in the record. On April 22d, bids were received by the city and filed with the recorder, among which was one by Montague-O'Reilly Company proposing to make the

improvement according to the plans and specifications adopted and on file, for the total estimated sum of $18,746.95. On April 29th the council adopted resolution No. 828, which in so far as deemed material to the issues is here set down:

"BE IT RESOLVED BY THE MAYOR AND COMMON COUNCIL OF THE CITY OF SALEM, OREGON. * * Section 2. That the council deems it expedient and proposes to improve South High Street from the south line of Mill Street to the south line of Bush Street with El Oso pavement, at the expense of the abutting and adjacent property within the said limits, said improvement to be made in accordance with the plans and specifications adopted for such improvement and on file in the office of the city recorder. Section 3. That the recorder be and he is hereby authorized and directed to publish for ten (10) days in some daily newspaper published in the city of Salem, Oregon, the following notice:

"'Notice is hereby given that the common council of the city of Salem, Oregon, deems it expedient and proposes to improve South High Street from the south line of Mill Street to the south line of Bush Street with El Oso pavement at the expense of the adjacent and abutting property within said limits, in accordance with the plans, specifications and estimates for the improvement of said South High Street from the south line of Mill Street to the south line of Bush Street as heretofore adopted by the common council and on file in the office of the city recorder which are hereby referred to for a more particular and detailed description of said improvement, and are hereby made a part of this notice. Written remonstrances against the improvement proposed herein may be made at any time within ten (10) days from the final publication of this notice in the manner provided by the city charter. This notice is published for ten (10) days pursuant to a resolution of the common council and the date of the first publication thereof is the —— day of ——, 1912,

and the date of the final publication will be the —— day of ——, 1912. * * * ' ''

About the 1st of May the recorder caused a certain notice of intention to improve a portion of South High Street to be published in the "Daily Oregon Statesman," reading thus:

"Defendant's Exhibit 'C.' Notice is hereby given that the common council of the city of Salem, Oregon, deems it expedient and proposes to improve South High Street from the south line of *Mill Creek* to the south line of Bush Street with El Oso pavement at the expense of the adjacent and abutting property within said limits, in accordance with the plans, * * [the remainder of the notice being in conformance with the resolution of the council].

"CHAS. F. ELGIN, City Recorder."

Thereafter a contract was entered into between the city and the Montague-O'Reilly Company for making the improvement and the work was commenced and prosecuted to completion. After the required notice the council adopted Ordinance No. 1306, assessing the share of the cost of the improvement against adjacent property, which assessment was docketed as a lien upon the respective abutting lots. AFFIRMED.

For appellant there was a brief over the names of *Mr. Bert W. Macy,* City Attorney, *Mr. William H. Trindle* and *Mr. George G. Bingham,* with oral arguments by *Mr. Macy* and *Mr. Trindle.*

For respondents there was a brief over the names of *Mr. William P. Lord, Mr. Grant Corby* and *Mr. John A. Carson,* with oral arguments by *Mr. Lord* and *Mr. Corby.*

MR. JUSTICE BEAN delivered the opinion of the court.

The defendant city sets forth all the proceedings leading up to the making of the assessment which it asserts is a valid lien upon the real property. Plaintiffs contest the sufficiency of the procedure to support the assessment and claim that the city authorities had no jurisdiction or authority to make the same. It will be observed that the notice to the property owners of the proposal to make the improvement of South High Street described the part to be paved as being "from the south line of *Mill Creek* to the south line of Bush Street," while the resolution of the common council authorizing the notice mentions that part to be improved as "South High Street from the south line of *Mill Street* to the south line of Bush Street." It is contended by counsel for plaintiffs that the notice as published was materially different from the one directed by the council and was not in conformity with the city charter; and that the recorder had no authority to publish such a notice. Bush Street is located south of Mill Street. South High Street crosses Mill Creek at right angles some three or four hundred feet south of Mill Street; hence, that much of the street designated in the resolution was left out of the notice. Mill Creek is a good-sized stream with a well-defined south line or bank. In ascertaining whether the required remonstrance to defeat the improvement could be obtained an owner of adjacent property between the "south line of Mill Creek and the south line of Bush Street" who would be governed by the notice would not take into consideration the realty adjacent to that part of the street not contained in the notice. The owners of the latter property would have no notice whatever. It is manifest, therefore, that the omission

affects the substantial rights of the property owners interested. All realty holders on the entire portion of the street to be paved have a common interest in the right to remonstrate.

The matter, however, is controlled by the city charter, Section 45 of which confers upon the city council the power and authority, whenever it deems it expedient, to improve or build any street or part thereof within the city at the expense of the owners of adjacent property. Section 26 provides in part as follows:

"The council in improving any street or streets, or any part or parts thereof within the city of Salem, Oregon, shall require from the city engineer plans, specifications and estimates for two (2) or more kinds of appropriate improvements at least one of which must be of a non-patentable kind, and the city engineer shall file said plans, specifications and estimates in the office of the city recorder of the city of Salem, Oregon. If the council shall find such plans, specifications and estimates to be satisfactory it shall approve the same, and shall determine the limits of the street proposed to be improved, and the council shall, by resolution declare its purpose and intention of making said improvement and determine the portion of the street to be improved. * * Provided, that no grade or improvement mentioned in this section or in section 25, except the original establishing of the grade, can be made without ten (10) days' notice thereof being first given by publication in some daily newspaper published in the city of Salem, Oregon; Provided, however, in case of the improvement of any street or any part thereof, such notice shall not be required to be published until the council has determined the kind and character of the improvement to be made as herein specified. * * "

The next section reads thus:

"Section 27. (What Notice Must Specify.) Such notice must be given by the recorder, by order of the council, and must specify with convenient certainty the

sewer or street, or part thereof, proposed to be improved, or of which the grade is proposed to be established or altered, and the kind of improvement which is proposed to be made. (S. L. 1901, p. 284.)"

It is argued by counsel for the city that the notice as published is good as to the owners of property adjacent to the portion of the street described, which would include the plaintiffs. By the plain mandate of the charter the city council shall by resolution "determine the portion of the street to be improved"; and, further, "such notice must be given by the recorder by order of the council" and must specify with convenient certainty the street or part thereof proposed to be improved. The recorder is not empowered to determine what part of a street shall be improved, and any notice of street improvement given by that official without the sanction of the city council is not effective. It is further claimed on behalf of the city that as the notice refers to the plans, specifications and estimates for the improvement of "said South High Street from the south line of Mill Street to the south line of Bush Street" on file in the office of the city recorder, the erroneous description is cured. Reference to the plans and specifications appears to be made in the notice as a means of ascertaining the details and kind of improvement and not in order to contradict or delineate the description of the portion of the street determined to be improved. It will also be seen by reading the charter that in the regular order indicated the part of the street proposed to be paved would be determined after the plans and specifications were filed and would not necessarily be of the same extent as indicated therein. The plans and specifications were not referred to in the notice as a part of the description of the street nor for the purpose of aiding the property owners in determining the property to be

affected by the improvement. The notice in question is not similar to the one in *Rogers* v. *City of Salem,* 61 Or. 321, 325 (122 Pac. 308). The notice as published was not authorized by the common council, and did not confer power or jurisdiction upon that body to take the subsequent proceedings for the improvement of South High Street from the south line of Mill Street to the south line of Bush Street, nor to assess the cost thereof against any of the abutting property. The assessment was invalid. The adjacent property owners are entitled to know what portion of the street is proposed to be improved in order to give them an opportunity to remonstrate. The requirement of the city charter that ten days' notice of intention to improve a street be given to the property owners must be complied with by the city authorities before the council has jurisdiction to make the improvement at the expense of the abutting property owners: Sections 43 and 44, Rev. Charter City of Salem, as amended December 4, 1911; *Paulson* v. *Portland,* 16 Or. 450 (19 Pac. 450, 1 L. R. A. 673, 149 U. S. 30, 37 L. Ed. 637, 13 Sup. Ct. Rep. 750); *Ladd* v. *Spencer,* 23 Or. 193 (31 Pac. 474); *Smith* v. *Minto,* 30 Or. 351, 354 (48 Pac. 166); *Bank of Columbia* v. *Portland,* 41 Or. 1 (67 Pac. 1112); *Jones* v. *City of Salem,* 63 Or. 126 (123 Pac. 1096); *Johns* v. *City of Pendleton,* 66 Or. 182 (Ann. Cas. 1915B, 454, 46 L. R. A. (N. S.) 990, 134 Pac. 312); *Dyer* v. *Bandon,* 68 Or. 406 (136 Pac. 652); *Watson* v. *City of Salem,* 84 Or. 666 (164 Pac. 567). This conclusion renders it unnecessary to consider several irregularities complained of. The decree of the lower court will therefore be affirmed. AFFIRMED.

MR. CHIEF JUSTICE MCBRIDE, MR. JUSTICE BENSON and MR. JUSTICE HARRIS concur.

Argued April 13, affirmed May 1, 1917.

LORD *v.* CITY OF SALEM.

(164 Pac. 717.)

From Marion: WILLIAM GALLOWAY, Judge.

This is a suit by Juliet Lord and Montague Lord against the City of Salem, Chas. F. Elgin, City Recorder, and Frank Shedeck to remove a penumbra from plaintiff's title caused by the levying of an alleged illegal assessment for certain street improvements against their property. From a decree favoring plaintiffs, the defendants appeal. Affirmed.

For appellants there was a brief over the names of *Mr. Bert W. Macy,* City Attorney, *Mr. William H. Trindle* and *Mr. George G. Bingham,* with oral arguments by *Mr. Macy* and *Mr. Trindle.*

For respondents there was a brief over the names of *Mr. William P. Lord, Mr. Grant Corby* and *Mr. John A. Carson,* with oral arguments by *Mr. Lord* and *Mr. Corby.*

Department 1. MR. JUSTICE BEAN delivered the opinion of the court.

This suit is brought for the removal of a cloud from the plaintiffs' title created by reason of the levying of an assessment against their property for the construction of the same improvement as that under consideration in *Fry* v. *City of Salem, ante,* p. 184 (164 Pac. 715), and *Carson* v. *City of Salem, post,* p. 193 (164 Pac. 718). The questions herein involved are the same as those raised in the above-named cases; therefore, for the reasons given in the opinion this day ren-

dered in the case of *Fry* v. *City of Salem, ante,* p. 184, the decree of the Circuit Court is affirmed.

AFFIRMED.

MR. CHIEF JUSTICE MCBRIDE, MR. JUSTICE BENSON and MR. JUSTICE HARRIS concur.

Argued April 13, affirmed May 1, 1917.

CARSON *v.* CITY OF SALEM.

(164 Pac. 718.)

From Marion: WILLIAM GALLOWAY, Judge.

This is a suit in which Helen F. Carson, administratrix of the estate of John A. Carson, deceased, was substituted as plaintiff instead of John A. Carson against the City of Salem to quiet title.

From a decree in favor of plaintiff, defendant city appeals. Affirmed.

For appellant there was a brief over the names of *Mr. Bert W. Macy,* City Attorney, *Mr. William H. Trindle* and *Mr. George G. Bingham,* with oral arguments by *Mr. Macy* and *Mr. Trindle.*

For respondent there was a brief over the names of *Mr. William P. Lord, Mr. Grant Corby* and *Mr. John A. Carson,* with oral arguments by *Mr. Lord* and *Mr. Corby.*

Department 1. MR. JUSTICE BEAN delivered the opinion of the court.

This is a suit to quiet title involving the validity of an assessment upon the plaintiff's property for the

improvement of South High Street from the south line of Mill Street to the south line of Bush Street. From a decree in favor of plaintiff, defendant appeals.

The issues in this suit are identical with those in the case of *Fry et al.* v. *City of Salem, ante,* p. 184 (164 Pac. 715), in which an opinion has this day been rendered. It is unnecessary to repeat what was said in that case. For the reasons stated therein the decree of the Circuit Court is affirmed. AFFIRMED.

MR. CHIEF JUSTICE MCBRIDE, MR. JUSTICE BENSON and MR. JUSTICE HARRIS concur.

Argued April 24, affirmed May 1, 1917.

HART *v.* CITY OF INDEPENDENCE.

(164 Pac. 719.)

Municipal Corporations—Location of Streets—Sufficiency of Evidence.

1. Where a street location had been recognized for 40 years, a survey measured from a corner located by discovering a bottle buried in the ground as described in a deed *held* insufficient to change the boundaries of the street.

Estoppel—Municipal Corporations—Location of Street.

2. Where a street was located according to the theory of men who laid out the town, had been maintained for over 40 years, and sidewalks and valuable improvements made, the city is estopped from changing its boundaries merely to attain mathematical exactness.

[As to power of a municipality to vacate or discontinue a street, see note in 46 **Am. St. Rep.** 493.]

From Polk: HARRY H. BELT, Judge.

Suit to enjoin the improvement of Main Street in the City of Independence, a municipal corporation, in which James S. Hart and others, as plaintiffs, were successful and the city appeals. Affirmed.

Department 1. Statement by MR. CHIEF JUSTICE McBRIDE.

This is a suit to enjoin the defendant from improving Main Street in the City of Independence, which street is also sometimes called the Salem-Independence County road, in accordance with a recent resurvey of said street by which defendant claims that it runs over and includes portions of certain lots owned and occupied by plaintiffs.

The complaint alleges that the highway has been used and traveled by the public in its present location for more than forty years; that it is a legal county road under the exclusive jurisdiction of the County Court of Polk County, and never has been a street within the jurisdiction of the municipality of the City of Independence; that plaintiffs are the owners of certain lots abutting on said highway and that they and their grantors have been in the peaceable, undisturbed, continuous and adverse possession of these said premises for more than forty years; that they have been using said premises for residence purposes only for more than twenty years last past, and that there are now standing thereon dwelling-houses and many fruit and ornamental trees which greatly enhance the value of their property; that upon the line between their lots and said highway as it has been used for more than twenty years last past there have been fences erected and maintained thereon for that length of time, and that said fences and residences have been constructed with reference to the county road and highway as it is now traveled and used. Then follow allegations that the city threatens to improve said highway as a street by assuming that the street line extends over and upon the premises of plaintiff to their

great and irreparable damage, the nature of which is fully set forth.

The defendants after formal denials of the existence of the highway as claimed by plaintiffs answered alleging the dedication of the town plat by one E. A. Thorp in November, 1850, and the recording of said plat in 1879, and the incorporation of the City of Independence. It was then alleged that Main Street in the City of Independence was one of the streets shown on said plat and included the lands claimed by plaintiffs; that by virtue of certain ordinances passed by the city it was proceeding to improve said Main Street, that the defendants were wrongfully maintaining fences therein, and that the lands claimed by plaintiffs were a part of said street.

The plaintiffs in their reply pleaded as matter in estoppel that Charles Dick was the owner of certain described lots and that he and his predecessors have been in exclusive possession of the land in dispute for more than forty years and have built fences and buildings and planted useful and ornamental trees with reference to the present location of the fence and county road which the proposed change in the street line would destroy if the same were carried out. There were similar pleas as to the other plaintiffs. Thorp's dedication of his plat reads as follows:

"This indenture witnesseth, that for the purpose of laying out and establishing a town within the county of Polk, and state of Oregon, to be known and designated as the town of Independence and in consideration of the location and establishment of said town and of the benefits to thereby accrue to me, I, E. A. Thorp, hereby signify my approval of the location of said town, or so much thereof as may be upon my land, and do hereby grant, dedicate, and quitclaim unto the inhabitants of said town, all and singular of the lands

hereinafter described, laid out, and designated as streets and alleys, the plat and description of said town of Independence being as follows, to wit: The same being in the northeast end of my donation land claim." AFFIRMED.

For appellant there was a brief over the names of *Mr. Benjamin F. Swope* and *Messrs. Carson & Brown*, with oral arguments by *Mr. Thomas Brown* and *Mr. Swope*.

For respondents there was a brief over the names of *Messrs. McNary & McNary* and *Mr. Everil M. Page*, with oral arguments by *Mr. John H. McNary* and *Mr. Page*.

Opinion by MR. CHIEF JUSTICE MCBRIDE.

There is not sufficient evidence here to justify us in changing the lines of the streets of Independence as they have been acquiesced in and recognized for forty years before the last survey. It is evident that no survey was made when the land was originally platted, but by referring to the plat it is plain that Thorp intended to plat the northeast corner of his claim. The original field-notes are not here, and there is not a scrap of original evidence anywhere in the record to identify the location of the northeast corner. In this dilemma the surveyor attempted to locate it by reference to a description in a deed from E. A. Thorp to A. Nelson, dated March 21, 1883, conveying all his donation land claim not included in the town plat in which deed the beginning point is described as follows: "Beginning at the northeast corner of said land claim where a bottle with charcoal in it is sunk in the ground," etc. Upon what data this description is based does not appear. Evidently it was not a "gov-

ernment corner," because the government surveys are not marked by beer bottles buried in the ground; and it is a matter of common knowledge that in the early fifties, when these donation claims were being surveyed, Oregon was in a state of pristine purity and sobriety and beer bottles were unknown. So this beer bottle which the surveyor found and dug up and identifies as such must belong to a more recent geological period than that extending from 1850 to 1854. There is no proof of the accuracy of the survey, if there was a survey, when it was buried and no sufficient proof that it was the same bottle referred to in Thorp's deed, though it probably was. It is not nearly so reliable as indicating the location of the streets as the acts of old settlers, including Thorp himself, who owned some of the lots now owned by one of the plaintiffs and who maintained his fences upon the street line as it is now claimed by them. If anybody on earth knew the boundary lines of Main Street Thorp was that man. He was the owner of the town site and interested in the progress of the town, and it is not probable that he would infringe upon the streets which he had laid out or allow his neighbors to do so without remonstrance.

Upon the whole testimony we are inclined to the opinion that the boundaries of Main Street are as a matter of fact where the plaintiffs contend; but even if the northeast corner of the Thorp donation land claim is situated where defendant's engineer places it, the city is estopped from claiming a right to shift the boundaries of the street which have been accepted and acquiesced in by everybody for nearly half a century, merely to attain mathematical exactness. This is not a case like *Oliver* v. *Synhorst*, 58 Or. 582 (109 Pac. 762, 115 Pac. 594), or *Cruson* v. *Lebanon*, 64 Or. 593 (131 Pac. 316), where there would have been no difficulty in

ascertaining the exact boundaries of the street if the parties had been reasonably diligent. Here the plaintiffs have adopted the theory of the man who laid out the town and dedicated the plat and assuming that he knew the lines of the streets he had dedicated have purchased from him and in some instances only replaced the fences placed by him upon what he evidently believed was the street line. These lots are not in an outlying and unoccupied part of the city, but upon one of its earliest occupied streets. With the acquiescence of the city and under the direction of its officials permanent sidewalks have been erected and valuable improvements made. For forty years the street has been actually used by the public upon the ground and within the boundaries claimed by plaintiffs. There it will remain.

The decree is affirmed. AFFIRMED.

MR. JUSTICE BENSON, MR. JUSTICE BURNETT and MR. JUSTICE HARRIS, concur.

Argued April 25, reversed May 1, 1917.

GREGORY *v.* OREGON FRUIT JUICE CO.

(164 Pac. 728.)

Trover and Conversion—Conversion.

1. Refusal to surrender an article to the owner entitled to its possession is a conversion.

Contracts—Agreement to Contract—Meeting of Minds.

2. There is not the necessary meeting of minds where the terms of the chattel mortgage which parties agree shall be executed and substituted for a lien giving right to possession are not agreed on with certainty.

Trover and Conversion—Right to Possession—Burden of Proof.

3. Plaintiff claiming conversion because of defendant having a lien on the chattel entitling him to possession, having agreed to ac-

cept a chattel mortgage and permit removal of the article, and then having refused to accept a tendered note and mortgage, has the burden of showing that the terms of the mortgage were definitely agreed on, and tender of a note and mortgage in conformity.

[As to conversion such as is sufficient to sustain the action of trover, see note in 24 Am. St. Rep. 795.]

From Marion: PERCY R. KELLY, Judge.

Action by J. C. Gregory against the Oregon Fruit Juice Company, a corporation, for damages for conversion. From a verdict and judgment in favor of plaintiff, defendant appeals. Reversed with directions.

Department 1. Statement by MR. JUSTICE MCCAMANT.

This is an action to recover damages for the conversion of a hydraulic pressing machine and equipment. It appears that plaintiff installed his machine in the defendant's place of business at Salem for use during the berry season of 1915. The machine was incomplete when installed and plaintiff was unable to purchase the parts needed to equip it for the work contemplated. The defendant agreed to advance the necessary funds for this purpose, taking a lien on the machine for its security. The advances of the defendant aggregated about $400. On June 11, 1915, the parties entered into a written contract whereby defendant agreed to pay plaintiff thirty cents an hour for his services and the use of the machine. Plaintiff agreed "to give his interest-bearing note for the sums of money advanced, same to be payable on or before June 1, 1916," and to give a bill of sale or chattel mortgage to secure the note. The agreement provides: "it is further understood and agreed that said moneys so advanced acts as a lien upon said hydraulic pressing machine." The machine was used in de-

fendant's plant during the berry season of 1915 and plaintiff ceased working therein about the end of July. He had made arrangements to press apples at Lebanon and desired to take the machine there for that purpose. He admits that defendant was not repaid its advances and makes no claim that it waived its lien. Plaintiff does contend that subsequent to June 11, 1915, an agreement was entered into whereby defendant consented to accept a chattel mortgage for the amount of its debt and to permit plaintiff to remove the press out of the county, to Lebanon. Defendant refused to surrender the machine and plaintiff brought this action, claiming damages in the sum of $2,054.93. Of this sum $564.93 is alleged as the value of the machine; the remainder of the damage is predicated on the interference with plaintiff's plans to use the machine at Lebanon. The jury rendered a verdict for plaintiff in the sum of $225, on which judgment was entered. Defendant appeals.

REVERSED WITH DIRECTIONS.

For appellant there was a brief and an oral argument by *Mr. William H. Trindle.*

For respondent there was a brief and an oral argument by *Mr. Frederick S. Lamport.*

MR. JUSTICE MCCAMANT delivered the opinion of the court.

1. At the conclusion of plaintiff's testimony the defendant moved for a nonsuit, and error is assigned on the denial of this motion. Plaintiff bases his claim of conversion on the refusal of the defendant to permit him to take the machine to Lebanon. If plaintiff was entitled to the possession of the machine the

refusal of the defendant to surrender it was a conversion: *Budd* v. *Multnomah Ry. Co.*, 12 Or. 271, 274 (7 Pac. 99, 53 Am. Rep. 355). In this case the court said:

"The wrong lies in the interference with the owner's right to do as he will with his own. Whoever does this in any manner subversive of the owner's right to enjoy or control what is his own, is guilty of a conversion."

2. Was plaintiff entitled to the possession of the machine? It is conceded that the agreement of June 11th gave defendant the right of possession as an incident to its lien. Plaintiff relies wholly on an alleged subsequent agreement made with defendant whereby defendant covenanted to accept a chattel mortgage and permit the removal of the machine. It is conceded that when a note and chattel mortgage were tendered defendant refused to accept them. We are therefore called upon to determine whether there was any evidence of such a subsequent agreement and whether the note and mortgage tendered were in conformity thereto.

We think there was some evidence that defendant agreed to accept a chattel mortgage although plaintiff's testimony on this subject is contradictory. There is also evidence from which the jury could find that the parties agreed on $365.93 as the debt to be secured by the mortgage, and June 1, 1916, as the date of maturity of the note. The evidence also justifies the conclusion that the chattel mortgage to be given was to be in such form as to permit plaintiff to take the machine to Lebanon. The evidence is silent as to all other provisions in the contract.

In the case of *Holtz* v. *Olds*, decided April 10, 1917 (*post*, p. 567, 164 Pac. 583), we considered the effect

of an agreement to make an agreement. The law as announced in that opinion is as follows:

"It is indeed competent for parties to enter into a preliminary agreement looking to the execution of a consequent one in the future. We have daily examples of that kind in bonds for deeds or in contracts for insurance, the policies of which are yet to be issued. But in all cases the minds of the parties must meet on the terms not only of the present convention, but also as to those of the covenants yet to be executed. If this rule be not observed in the stipulation and a substantial part is left open for further settlement without a canon by which the subsequent negotiations may be controlled there is no *aggregatio mentium* so essential to every contract."

3. The burden devolved on plaintiff to prove an executory agreement to execute a chattel mortgage certain within the rule announced in the above case and the tender of a note and mortgage conforming thereto. In our opinion he has failed to do so. The only note and mortgage tendered, so far as the record shows, were dated September 11, 1915; the note bears interest only from that date. It appears that a portion of the defendant's advances were made in April and the bulk of them in June. There is no evidence that defendant waived interest earned prior to September 11th. The mortgage tendered provided that on default defendant's remedy should be to sell the property at a sale had under its own direction. Under Section 7411, L. O. L., such remedy is exclusive. The defendant may well have preferred the remedy provided by statute, eliminating as it does some obligations which the law imposes on a mortgagee under the covenants of the mortgage tendered. The instrument tendered is out of harmony with plaintiff's testimony in that it forbids the removal of the security from Marion

County without the written consent of the mortgagee. The note tendered was unstamped as required by the internal revenue law then in force and if defendant had accepted it, appreciating this fact, it would have been guilty of a misdemeanor: Bender's War Revenue Law, p. 55; Act of Congress, approved October 22, 1914, § 9. Defendant was justified in refusing to accept the note and mortgage tendered.

Our attention is called to a line of authority holding that when a check is tendered as payment and the creditor refuses the tender on some other ground, he cannot subsequently object to the tender because it was in the form of a check. Plaintiff's allegations and proofs do not bring him within this principle of law. He does not allege a waiver of proper tender and the proof shows that defendant assigned no reason for refusing the tender. There being no evidence that the minds of the parties ever met in an agreement subsequent to June 11, 1915, defendant was entitled to possession of the machine under the agreement of that date.

The Circuit Court erred in denying the motion for a nonsuit. The judgment is reversed and the lower court instructed to enter judgment of nonsuit.

REVERSED WITH DIRECTIONS.

MR. JUSTICE BURNETT, MR. JUSTICE BENSON and MR. JUSTICE HARRIS concur.

Argued April 10, modified and affirmed May 1, 1917.

HAYDEN *v.* CITY OF ASTORIA.*

(164 Pac. 729.)

Appeal and Error—Assignment of Error—Sufficiency.

1. Under the rule of the Supreme Court requiring that appellant set out briefly and concisely the errors relied on, where the bill of exceptions shows that plaintiffs-appellants pointed out to the lower court with precision and great detail what their contentions were, and such contentions are presented in the Supreme Court in plaintiff's briefs with the same clearness, the assignment of error that the trial court erred in not rendering judgment for plaintiffs in a larger amount is sufficient, since the rule should be construed reasonably and liberally to promote justice, and not so as to embarrass suitors by unnecessary restrictions.

Municipal Corporations — Improvement Contracts — Delaying Contractors—Recovery on Quantum Meruit.

2. Where a city, by enlarging the excavation and by imposing burdensome methods of doing the work, delayed its contractors for a dam so that they could not begin the laying of concrete until the fall, and the most burdensome portion of the work had to be done in the winter season under most disadvantageous conditions, the contractors were entitled to recover on a *quantum meruit* for the excess cost incurred by them.

Municipal Corporations — Improvements — Rights of Contractors — Quantum Meruit—Evidence.

3. In an action against a city by its contractors to erect a dam to recover on a *quantum meruit* for work without the contract, the contract was admissible as establishing the standard of value.

Municipal Corporations—Improvements—Extra Work—Recovery.

4. So far as work done without their contract by contractors with a city to erect a dam conforms to the contract in character and in the conditions under which it is done, the contract price will govern the contractors' extra recovery on a *quantum meruit* against the city.

Municipal Corporations—Extra Work—Recovery on Quantum Meruit.

5. When contractors with a city to erect a dam did extra work under burdensome conditions not within the contemplation of the parties when the contract was made, the deviations from the contract being so material as to entitle the contractors to recover on a *quantum meruit*, the recovery allowed should take the form of damages adequate to compensate for the additional burdens, which damages should be added to the contract price.

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*On right of contractor to sue on *quantum meruit* upon breach of construction contract by the other party thereto, see note in 13 **L. R. A. (N. S.)** 448. REPORTER.

Appeal and Error—Review—Findings of Court Without Jury.

6. In trying a case without a jury, the Circuit Court exercised the functions of a jury, and its findings, having the force and effect of a special verdict, and entitling plaintiffs, in whose favor they were, to the benefit of any conclusions of law arising from them, are binding on the Supreme Court, unless wholly without support in evidence.

Appeal and Error—Review—Finding on Conflicting Testimony.

7. A finding on conflicting testimony made by the Circuit Court trying a case without a jury is binding on the Supreme Court.

Pleading—Bill of Particulars—Limitation of Proof.

8. When a bill of particulars is furnished as required by statute or by the order of a court of competent jurisdiction, the party furnishing it is confined in his proof to the items alleged therein, though he may offer proof of the value of the items along other lines than those alleged in the bill.

Pleading—Bill of Particulars—Statute.

9. Under Oregon law, a bill of particulars is demandable only under the provisions of Section 84, L. O. L., and, unless the complaint alleges an account, a bill of particulars is not demandable under the section.

Account, Action on—Contractors' Action.

10. An action against a city by its contractors to erect a dam to recover on a *quantum meruit* for the excess cost of doing the work incurred on account of the city's increasing the amount of excavation and delaying the work, was not an action on an account.

Pleading—Bill of Particulars—Limitation of Testimony—Statute.

11. In an action against a city by its contractors to erect a dam to recover the reasonable cost of extra work, where the contractors furnished an account on demand of the city, the action not being on an account, so that a bill of particulars was not demandable under Section 84, L. O. L., the account furnished could not be used to shut out testimony otherwise competent in the absence of showing that the city had been misled.

Account Stated—Accounting Month by Month.

12. Where contractors with a city to erect a dam frequently complained to the city's representatives that much more excavation was demanded of them than they were required by the contract to render, and notified the city's representatives several times that they would expect additional compensation, there was not an accounting month by month as matter of law because the contractors in a number of cases marked monthly estimates of their work O. K. over their signature and accepted 90 per cent of the contract price therefor in accordance with the contract, the elements of estoppel being lacking.

[As to the rule that receipt of a statement of account without protest amounts to an admission of its correctness, see note in Ann. Cas. 1915A, 694.]

Evidence—Expert Evidence—Qualification of Witness.

13. In an action against a city by its contractors to erect a dam to recover on a *quantum meruit* for extra work, a plaintiff, who had been in the contracting business for 12 years, the excavation of material having been part of the work in which he had been engaged, was qualified to testify as to what is the usual and ordinary way of making an excavation.

Evidence—Expert Evidence—Qualification of Witness.

14. Another witness, who had been in charge of construction work for 10 years or more up to the time of the trial, and who had built 40 miles of railroad, excavation being one of the lines in which he had had large experience, was also qualified.

Municipal Corporations—Improvement Contract—Extra Work—Evidence.

15. In an action against a city by its contractors to build a dam to recover on a *quantum meruit* for extra work and delay caused by the city, where a ground alleged by the contractors for their right to recover was the increased burden of the work during the winter season, their testimony tending to show that the road into the works was a good road in summer, but that it would have been impassable in winter but for the work they did on it, was competent.

Municipal Corporations—Extra Work—Evidence.

16. It was also competent for the contractors to prove that their labor was less efficient in the winter season, and that the burden of operating the rock quarry was greater in the winter.

Municipal Corporations—Improvements—Extra Work—Evidence.

17. The contractors were properly permitted to show that but for the deviations from the contract complained of they could have completed the work during the summer.

Interest—Allowance to Contractors.

18. In such action, the trial court improperly allowed interest on the contractors' recovery from the date of the completion of the dam, they being entitled to interest only from the date of the judgment on the amounts recovered.

Appeal and Error—Remand for Correction—Necessity.

19. Under Article VII, Section 3, of the Constitution, as amended in 1910, the Supreme Court need not remand the cause for new trial to correct numerical errors in the judgment, one caused by a mistake in addition, the other by mistranscribing an item in a finding of fact, the Supreme Court being entitled to direct the trial court to correct the judgment.

From Clatsop: JAMES U. CAMPBELL, Judge.

This is an action by Wilbur Hayden, Hoyt Hayden, T. B. Bidwell and J. F. Meager, partners doing business under the copartnership name of Bidwell, Hayden

& Co., against the City of Astoria, a municipal corporation, in which both parties are dissatisfied with the judgment and appeal. Modified and affirmed.

In Banc. Statement by MR. JUSTICE MCCAMANT.

On August 22, 1911, plaintiffs contracted with the defendant for the construction of a dam on Bear Creek, in Clatsop County, in accordance with plans and specifications furnished by the defendant. During the winter of 1911–12 they cleared the reservoir site and entered on the work of excavation about April 1, 1912. Plaintiffs claim and the lower court found that the amount of excavation called for by the contract could have been completed in a month, or by May 1, 1912.

The city engineer of the defendant demanded large additional excavation with a view to securing a satisfactory foundation for the dam; for this reason and because of the manner in which defendant's engineer required the work to be done, the excavation was not completed until August 29, 1912. This delay compelled plaintiffs to perform a large share of the work during the winter of 1912–13 under expensive and disadvantageous conditions. The work was completed June 27, 1913, and accepted by the defendant as satisfactory.

On November 28, 1913, plaintiffs brought this action in the Circuit Court for Clatsop County, claiming that such deviations from the contract had been required of them as entitled them to recover on a *quantum meruit* the reasonable value of their work and materials. This value, they claimed, was $61,666.47 over and above the sum of $91,779.11, which had been paid them by the city. The Circuit Court struck the amended complaint from the files for failure to comply with an order to make more definite, and plaintiffs

appealed to this court. The judgment of the lower court was reversed (see 74 Or. 525, 145 Pac. 1072). This court upheld the sufficiency of the amended complaint and the right of plaintiffs to recover on a *quantum meruit* under the allegations of this pleading.

The defendant answered, denying most of the allegations of the amended complaint and setting up certain affirmative defenses. The first affirmative answer set up that the extra work of plaintiffs had been performed as "force account" and that plaintiffs had been paid therefor in accordance with their contract except for the sum of $482.50, which defendant had tendered. The second and third affirmative answers plead an estoppel against plaintiffs by the acceptance and approval of the monthly estimates in their favor, by their request for extensions of time within which to perform the work, and by their failure to complain of the matters now relied on. The fourth affirmative answer alleges that extensions of time were granted plaintiffs, conditioned on their payment of the defendant's engineering expense during the period of extension, and a counterclaim of $4,428.07 is set up on this account. The fifth affirmative answer tenders plaintiffs a judgment in the sum of $10,371.11. The reply denies the material allegations of the answer.

The case was tried by the lower court without the intervention of a jury. The court passed fifty-two findings of fact. These findings are too lengthy to be incorporated even in substance in this statement of facts. In the main they were in accord with plaintiffs' contentions and bore out the allegations of the amended complaint. The findings were to the effect that the departures from the contract of August 22, 1911, were so numerous and so substantial as to entitle plaintiffs to recover on a *quantum meruit*. The forty-

eighth finding fixed the compensation of plaintiffs at $114,604.72, this amount being made up of fifteen specifications into which the work done by them was divided. In thirteen of these cases plaintiffs were allowed only the prices provided by the contract. For the laying of 5,470 yards of concrete they were allowed $11.10 a yard as against $8.88 provided by the contract. The total excavation amounted to 6,256 yards; the lower court allowed only the contract price for excavating 6,152 yards, but a 20 per cent increase over the contract price was allowed for excavating 104 yards of rock. This increase amounted to $41.60. Plaintiffs had received from the defendant $91,848.41 on account of their compensation, and the lower court gave them judgment for the additional sum of $22,756.31, with interest thereon from June 27, 1913, the date when the dam was completed. Both parties have appealed. MODIFIED AND AFFIRMED.

For plaintiffs-appellants there was a brief and an oral argument by *Mr. Coy Burnett.*

For defendant-appellant there was a brief over the names of *Mr. A. W. Norblad,* City Attorney, and *Messrs. G. C. & A. C. Fulton,* with an oral argument by *Mr. George C. Fulton.*

MR. JUSTICE MCCAMANT delivered the opinion of the court.

The sole assignment of errors on behalf of plaintiffs is as follows:

"That the court erred in not rendering judgment for the plaintiffs in a larger amount."

1. The defendant contends that this assignment is insufficient. It would have been better practice for

plaintiffs to specify the items in the findings of the lower court which are objected to and also the additional amounts claimed by them for each class of work. The requirement of assignments of error is no longer statutory in this state, but is found in the rules of this court. The requirement is that appellant "set out briefly and concisely the errors relied on." The rule "should be construed reasonably and liberally to promote justice, and not so as to embarrass suitors in the appellate courts by unnecessary restrictions": 3 C. J. 1349. In other words, a party entitled to relief in this court should not be turned away remediless if any fair construction of the rule will uphold his assignments of error.

"In the later cases courts have shown that they are no longer disposed to scrutinize assignments of error with the minuteness which was applied in the earlier decisions": 2 R. C. L. 163.

The bill of exceptions shows that plaintiffs pointed out to the lower court with precision and in great detail what their contentions were, and these contentions are presented in this court with the same clearness in plaintiffs' briefs. In view of these other portions of the record we think the assignment of error above quoted sufficiently serves the purpose designed by the rule of this court.

2. The lower court found that the defendant had imposed burdens on plaintiffs not contemplated by the contract and that there had been such departures from the contract as entitled plaintiffs to recover on a *quantum meruit*. Plaintiffs claim that the measure of their recovery should be the cost to them of the work performed plus fifteen per cent for overhead and profit. The evidence abundantly sustains the findings of the lower court on the subject of a departure from the con-

tract. It sufficiently appears that the excavation contemplated by the parties when the contract was let could have been completed by May 1, 1912, and the entire dam could have been constructed by October 1, 1912; that by reason of an enlargement of the excavation and burdensome methods of doing the work, imposed on plaintiffs by defendant's engineers, the progress of the work was so delayed that plaintiffs could not begin the laying of concrete until September, 1912, and that the most burdensome portion of the work had to be done in the winter season under most disadvantageous conditions. These circumstances clearly entitle plaintiffs to recover on a *quantum meruit* for the reasons set forth in the former opinion of this court.

3–5. Evidence was offered and received on behalf of plaintiffs to the effect that contractors are usually compensated for work without their contract by the "force account" method; that is, by paying them the cost of doing the work plus a percentage to cover overhead expense and profit. Notwithstanding this testimony we think the lower court adopted the proper method of relieving plaintiffs. In this character of litigation the contract is admissible in evidence as establishing the standard of value: *Reynolds* v. *Jourdan,* 6 Cal. 108, 111; *Boyd* v. *Bargagliotti,* 12 Cal. App. 228 (107 Pac. 150, 154); *Wheeden* v. *Fiske,* 50 N. H. 125, 128. In so far as the work conforms to the contract in character and in the conditions under which it is done, the contract price will govern: *Dermott* (*Ingle*) v. *Jones,* 2 Wall. (69 U. S.) 1, 9 (17 L. Ed. 762); *Hollinsead* v. *Mactier,* 13 Wend. (N. Y.) 276; *Merrill* v. *Ithaca etc. R. Co.,* 16 Wend. (N. Y.) 586, 589 (30 Am. Dec. 130); *Board of Commissioners* v. *O'Connor,* 137 Ind. 622 (35 N. E. 1006, 1009, 37 N. E. 16); *Houston, E. & W. T. Ry. Co.* v. *Snelling,* 59 Tex. 116, 119; *De Boom* v. *Priestly,*

1 Cal. 206, 207. When, as in this case, the work is done under burdensome conditions not within the contemplation of the parties when the contract was made and when the deviations from the contract are so material as to entitle the contractor to recover on a *quantum meruit,* the recovery allowed should take the form of damages adequate to compensate for the additional burdens, which damages should be added to the contract price: *Dubois* v. *Delaware & H. Canal Co.,* 4 Wend. (N. Y.) 285, 291; *Koon* v. *Greenman,* 7 Wend. (N. Y.) 121, 123; *Houston, E. & W. T. Ry. Co.* v. *Snelling,* 59 Tex. 116, 120; *Wood* v. *Fort Wayne,* 119 U. S. 312, 321 (30 L. Ed. 416, 7 Sup. Ct. Rep. 219). In *Jones* v. *Woodbury,* 11 B. Mon. (50 Ky.) 167–169, the Kentucky court says:

"The general principle applicable to the case of a special contract for erecting a house, when in the progress of the work there have been alterations or additions not originally contemplated nor expressly provided for, seems to be that as far as the work can be traced under the original contract, it shall be paid for under that contract, and that the residue which cannot be brought within the contract shall be paid for as if there were no contract. But the safety of employers, and the good faith proper to be observed in all cases, requires that this rule should be so applied as not to violate the principles above stated; and they seem to indicate further, that extra work either in quantity or quality, unless done under an express agreement, or at least a statement of the price, should not be charged for at a greater rate in reference to the measure and value price of such work, than the contract price bears to the measure and value price of the work contracted to be done. So that if the contract price was a fourth or a fifth less than the price estimated by measure and value, the extra work should not be estimated at more than three-fourths or four-fifths of its price according to measure and value."

The rules announced in these authorities forbid us to sustain plaintiffs' contention that they are entitled to recover the cost to them of the work and materials plus a percentage for profit and superintendence. Their recovery was properly based on the unit prices provided by the contract with added damages to compensate for the burdens imposed upon them. This brings us to the question of the adequacy of the damages awarded.

6. The Circuit Court in trying this case exercised the functions of a jury. Its findings are binding on this court unless wholly without support in the evidence. The lower court found that Lars Bergsvik was engineer of the defendant in charge on its behalf of the work in question, and that Arne Froyseth was his assistant who was present on the work at all times. There was some conflict in the testimony as to the circumstances under which the work of excavation proceeded. The court resolved this conflicting testimony in favor of plaintiffs, finding as follows:

"That both the said Bergsvik and said Froyseth were unacquainted with the nature of the ground and soil or depth necessary for a proper foundation, and that Froyseth being the subordinate, was required frequently during the progress of the work, to stop operations until he could consult with Bergsvik, who was not present upon the work, and that these delays and the extra depth to which plaintiffs were required to excavate prevented the plaintiffs from doing the work or completing it within the time originally contemplated and fixed by the contract.

"That the specifications provide that the defendant shall furnish plaintiffs with stakes at all times to indicate the depth of the grade and excavation, and that this the defendant at all times refused to do, and that the furnishing of the same would have been a material help and assistance to the contractor in the performance of his work, and the refusal of the defendant to

so furnish them prevented the plaintiffs to the extent that it was impossible for them to complete the work in the time originally contemplated by and fixed in the contract.

"That the refusal to furnish stakes mentioned in the last finding, and the refusal of the defendant, through its agents, to at any time advise the plaintiffs the depth necessary for the excavation, required the plaintiffs to excavate the material in layers; thereby, the plaintiffs were required to make many small operations of what would ordinarily be one complete operation, and thus prevented the plaintiffs from doing the work within the time originally contemplated and fixed by the contract."

The testimony showed without contradiction that the method of excavating exacted by defendant's engineers added greatly to the expense and burden of the work. The findings above quoted have the force and effect of a special verdict. Plaintiffs are entitled to the benefit of any conclusions of law arising from them. We think the conclusion is inevitable that plaintiffs sustained material damage by these burdens imposed upon them and that they are entitled to such damages over and above the contract price as will make them whole. The Circuit Court allowed plaintiffs only the contract price for 6,152 yards of excavation and allowed an increase of 20 per cent thereover for excavating 104 yards. The damages so awarded amount to $41.60, a sum scarcely more than nominal. The finding of the lower court was to the effect that the disadvantageous conditions of which plaintiffs complain applied to the whole excavation. There is abundant evidence to support this finding. It follows that the damages of plaintiffs should be predicated on the entire excavation and not confined to an insignificant fraction thereof. We can find no better rule for admeasuring the damages than that ap-

plied by the lower court. Plaintiffs will therefore be awarded damages in the matter of excavation equal to 20 per cent of the contract price thereof. This will increase the judgment of plaintiffs by $1,880.90.

7. Plaintiffs complain that the damages awarded them for laying concrete are also inadequate. There is a great deal of evidence from which the Circuit Court might have found plaintiffs entitled to larger damages, but the record contains considerable evidence on behalf of the defendant on this issue. The contract price for laying concrete was $8.88 a yard. This was all that was allowed for 2,926.2 yards. For the remainder, 5,470 yards, the lower court allowed plaintiffs $11.10 a yard. A considerable portion of the concrete was laid under conditions contemplated when the contract was signed and the evidence justified the lower court in withholding damages to plaintiffs based on this portion of their work. As to the concrete laid in the winter season, two of defendant's witnesses testified that an advance of 10 per cent on the contract price would be adequate to cover the difference in conditions. Another witness for defendant placed the difference as low as 2 to 3 per cent. In view of the conflict in the testimony the finding of the Circuit Court is binding upon us on this issue. We think plaintiffs are entitled to no further modification of the judgment of the lower court.

The defendant assigns error on the refusal of the lower court to sustain a motion for a nonsuit. As already indicated, we think the evidence sustained the right of plaintiffs to recover on a *quantum meruit* for the reasons alleged in their amended complaint. The contention of the defendant on this branch of the case is based chiefly on another ground. The defendant demanded of plaintiffs a bill of particulars prior to

the previous appeal. Plaintiffs furnished in response to this demand a "statement showing expenditures building dam." This statement set out the various items of expenditure incurred by plaintiffs in carrying on their work. They claimed 15 per cent of these expenditures, presumably as a charge for overhead expense. The statement credited the defendant with certain payments and with another item. The net claim was for $61,666.47, the amount for which judgment was asked in the amended complaint. On the former appeal this court held that if this statement was regarded as insufficient it should have been attacked by a motion to make more definite. Thereafter without awaiting any action on the part of defendant, plaintiffs filed an amended verified statement of account or bill of particulars. This statement showed in great detail every expenditure made by plaintiffs in the performance of their work. It claimed the same damages as those alleged in the amended complaint. The defendant excepted to this amended statement, but the exceptions were never passed upon by the lower court. At the trial defendant contended that no evidence of the value of the work could be received other than its cost as set forth in this statement. Defendant also objected to the evidence of plaintiffs offered to prove the cost of the work as not tending to support the allegations of the amended complaint. The motion for a nonsuit is based chiefly on the alleged failure of plaintiffs to prove the value of their work in accordance with their statement.

8, 9. It is true, as contended by the defendant, that when a bill of particulars is furnished as required by statute or by the order of a court of competent jurisdiction, the party furnishing such bill is confined in his proof to the items therein alleged, although he may

offer proof of the value of the items along other lines than those alleged in the bill: *Robinson* v. *Weil,* 45 N. Y. 810. A bill of particulars under our law is demandable only under the provisions of Section 84, L. O. L. This section is as follows:

"A party may set forth in a pleading the items of an account therein alleged, or file a copy thereof, with the pleading verified by his own oath, or that of his agent or attorney, if within the personal knowledge of such agent or attorney, to the effect that he believes it to be true. If he do neither, he shall deliver to the adverse party, within five days after a demand thereof in writing, a copy of the account, verified as in this section provided, or be precluded from giving evidence thereof. The court or judge thereof may order a further account when the one filed or delivered is defective."

10. Unless the complaint alleges an account a bill of particulars is not demandable under this section: *Davis* v. *Hofer,* 38 Or. 150, 157, 158 (63 Pac. 56); *Ives* v. *Shaw,* 31 How. Pr. 54; 1 C. J. 653. We do not think this is an action on an account. We have held that plaintiffs are in error in their contention that they are entitled to recover their disbursements plus a percentage. The case therefore is one in which parties acting under a misapprehension of their remedy have furnished an account not demandable of them and which does not correctly state the amount to which they are entitled or the method of arriving at that amount. The account furnished is in harmony with the contentions of plaintiffs and with the amended complaint which alleges a usage to compensate by the force account method for work done without the contract. The adverse party has not been misled. The city understood perfectly that plaintiffs were claiming the reasonable value of the work done and material furnished. Both parties were chargeable with knowl-

edge of the law. They therefore knew that plaintiffs were entitled to recover, if at all, the contract price of the work plus such sum as should make them whole for their burdens not covered by the agreement. To ignore the evidence of the reasonable value of plaintiffs' work admitted in the court below and to set aside the findings based thereon, because of this statement, would be to exalt technicality and to lose sight of justice. In *Seaman* v. *Low*, 4 Bosw. (N. Y.) 337, 352, the court said:

"I apprehend that it is not the office of a bill of particulars to state the grounds of a plaintiff's claim, but simply to point out the items and particulars which he claims, in such a manner as will enable the party to prepare for trial, and if the specification be ambiguous or susceptible of a double interpretation, the defendant should apply to have it made more definite and certain, or the plaintiff would be permitted to give any evidence not clearly excluded by the terms used, subject only to the duty of the Court to see that the defendant is not misled to his prejudice."

11. It is not intended by this opinion to question the power of a court of general jurisdiction in a proper case and on a proper showing to require a party to furnish his adversary with such a specification of the cause of action or defense as shall prevent surprise and insure a fair trial. When an account is so furnished the party providing it is properly confined in his proof to the items alleged therein. What we do hold is that where an account is furnished on demand of the adverse party in a cause wherein the account is not demandable, the account so furnished cannot be used to shut out testimony otherwise competent, in the absence of a showing that the adverse party had been misled.

The former appeal did not raise the question of the measure of plaintiffs' damages and the court did not consider the question of whether this is an action on an account within the purview of Section 84, L. O. L. We adhere to the ruling on the former appeal that the lower court erred in requiring plaintiffs to make their amended complaint more definite and in entering judgment of dismissal for failure to comply with that order.

Under the contract plaintiffs were entitled to a monthly estimate of their work and to payment month by month of 90 per cent of the amount found due under the estimates. In a number of cases they marked estimates "O. K." over their signature. It is claimed that this circumstance and the acceptance of money under the estimates preclude a recovery in this case. The finding of the lower court on this subject was as follows:

"With reference to the estimates hereinbefore mentioned, the engineers in charge for the city, without any participation therein by the plaintiffs, made out statements of the amount of work done during the previous month and these statements were from month to month received by the plaintiffs, but the plaintiffs at no time represented to the defendant that such estimates were received in final payment, and at no time represented to the defendant that the plaintiffs were waiving their claim for the reasonable compensation of the work performed and labor furnished, and the defendant, by paying said amounts to plaintiffs has in no wise prejudiced itself or changed its position because of the acceptance by plaintiffs of said estimates, and the plaintiffs at times marked an O. K. upon the estimates, but that no importance was attached to this O. K. on the part of the city, and the same was not attached by the plaintiffs nor understood by the defendant as being any agreement as to the correctness or finality of said estimates, and the same are not in any wise final, but on the contrary by the specifications

herein and by the conduct of the parties, the whole matter was at all times left to final adjustment at the conclusion of the work, and that at such time of final adjustment the plaintiffs and the defendant were unable to agree either as to the basis of the adjustment or the amount owing to plaintiffs."

The defendant contends that this finding is without support in the evidence. There is testimony of the plaintiff Meager that he complained to Mr. Bergsvik of the manner in which plaintiffs were required to excavate and that Bergsvik said:

"Go on and do your excavating and a good job of concrete and we will take care of this in some way."

Plaintiffs claim to have relied on this assurance from defendant's engineer and to have regarded the monthly estimates as tentative. They frequently complained to defendant's representatives that much more was demanded of them than they were required by the contract to render. They notified the city's representatives several times that they would expect additional compensation.

12. It cannot be said as a matter of law that there was an accounting month by month: 1 R. C. L. 211. The elements of estoppel are lacking. The city paid plaintiffs less than they are entitled to, on the city's own showing. In any event the finding above quoted is sufficiently supported by the evidence and is fatal to defendant's contentions on this branch of the case.

13, 14. The defendant reserved numerous objections and exceptions to the testimony offered and admitted on behalf of plaintiffs. The plaintiff Wilbur Hayden was asked the following question: "What is the usual, ordinary way of making an excavation, if you know?" This question was objected to on the ground that the witness was not qualified. The testimony shows that

he had been in the contracting business for twelve years and that the excavation of material was a part of the work in which he had been engaged. We think his qualification sufficiently appeared and that other testimony of the same witness objected to on the same ground was properly admitted. The defendant reserved an objection and exception to similar testimony from the witness J. F. Meager. The testimony shows that this witness had been in charge of construction work from 1902 up to the time of the trial, that he had built forty miles of railroad and that excavation was one of the lines of work in which he had large experience.

15–17. The court received over the objection and exception of the defendant testimony tending to show the burden and expense of plaintiffs in maintaining during the winter of 1912–13 a wagon road from Svenson to the place where the work was in progress. Svenson is a station on the Astoria & Columbia River Railroad. One of the grounds alleged by plaintiffs for their right to recover on a *quantum meruit* was the increased burden of the work during the winter season, it being their contention that if the work had been only that provided by the contract it could have been completed in the summer of 1912. Their testimony tended to show that the road into the works was a good road in summer but that it would have been impassable in the winter season but for the work which they did on it. We think the evidence was competent and material. It was also competent for plaintiffs to prove that their labor was less efficient in the winter season and that the burden of operating the rock quarry was greater in the winter. The court properly permitted plaintiffs to show that but for the deviations from the contract complained of they could have completed the

work during the summer of 1912. Objection was reserved by the defendant to the evidence of plaintiffs as to the manner in which the excavation was done, the defendant contending that it was the duty of plaintiffs to have made written objection to the city and that in the absence of such written objection plaintiffs acquiesced in the orders of the engineers. The lower court found against the defendant on this issue, and we cannot say as a matter of law that plaintiffs acquiesced in the deviations from the contract of which they complain in this suit.

Numerous other objections and exceptions were reserved to the testimony on the part of the defendant but it is not deemed necessary to set them out in the opinion. We are clear that no reversible error was committed by the lower court in the respects complained of.

18. It is finally contended by the defendant that the lower court erred in allowing interest on plaintiffs' recovery from the date of the completion of the dam. This contention is well taken: *Sargent* v. *American Bank & Trust Co.*, 80 Or. 16, 39 (154 Pac. 759, 156 Pac. 431); *Baker County* v. *Huntington*, 48 Or. 593, 603 (87 Pac. 1036, 89 Pac. 144). Plaintiffs are entitled to interest only from the date of the judgment in the lower court on the amounts which they recovered therein.

Our attention is directed by the defendant to an error of $31 in the judgment of the lower court. One of the items making up the amount allowed plaintiffs is an item for force account aggregating $3,359.85. It appears from the forty-second finding of fact that this item should be $3,328.85. The defendant is entitled to have the judgment corrected to the extent of

the error and there is a further error of twenty-one cents in the addition of the items in finding 48.

19. Under Article VII, Section 3 of the Constitution, as amended in 1910, it is not necessary for this court to remand the cause for a new trial. We are entitled to direct the lower court to correct the judgment in the respects above indicated: *Knight* v. *Beyers,* 70 Or. 413, 418, 419 (134 Pac. 787). The cause will therefore be remanded to the lower court with instructions to modify the judgment by eliminating therefrom all interest prior to the date of the judgment and also the further sum of $31.21. The sum of $1,880.90 should be added to the remainder so obtained.

MODIFIED AND AFFIRMED.

Motion to affirm judgment overruled January 9, argued on the merits April 20, affirmed May 1, 1917.

WHITE *v.* EAST SIDE MILL CO.*

(161 Pac. 969; 164 Pac. 736.)

Appeal and Error—Record—Failure to File Transcript—Motion to Dismiss—Affidavits.

1. The recitals of a *nunc pro tunc* order as to an oral order previously made extending the time for filing transcript on appeal imports absolute verity, and cannot be contradicted, on motion to dismiss the appeal for failure to file transcript, by affidavits of counsel as to what actually occurred at the time of the previous order.

Appeal and Error—Transcript—Time for Filing—Extension.

2. Under Act Feb. 28, 1913 (Laws 1913, p. 619), providing that the trial court or Supreme Court may enlarge the time for filing the transcript, but that such order shall be made within the time allowed to file the transcript, an order extending the time for filing the transcript may be entered before appeal has been perfected.

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*On presumption of negligence in case of automobile accident, see note in 38 **L. R. A. (N. S.)** 496.

On the question of negligence of operator of automobile under particular state of facts, see note in 1 **L. R. A. (N. S.)** 228.

On instruction of negligence of operator of automobile under particular state of facts, see note in 1 **L. R. A. (N. S.)** 234.

REPORTER.

Appeal and Error—Order Extending Time to File Transcript—"From Day to Day."

3. An order extending time for filing transcript "from day to day" is self-executing to extend the time from one day to another until the next term of the appellate court, and gives the court making it jurisdiction to make further order limiting the time for such filing.

Courts—Record—"Journal Entry."

4. A "journal entry" is the prescribed memorial of what the court actually did, and must speak the real truth; so that, if the court did not in fact make an order on a certain date, one cannot be supplied by any subsequent journal entry.

Motions—Nunc Pro Tunc Order.

5. The authority to make an order *nunc pro tunc* cannot be used to amend or change an order actually made.

Appeal and Error—Transcript—Time to File—Extension—Nunc Pro Tunc Order.

6. An order reciting that the court previously orally ordered that time for filing transcript on appeal be extended from day to day and ordering that appellant have an extension of ten days after the date when the court reporter should file a typewritten transcript of his stenographic notes of the testimony, operated not only as a *nunc pro tunc* order, but also as a new order further declaring the limits of time within which the transcript might be filed.

Appeal and Error—Record—Time to File Transcript—Extension.

7. Under Laws 1913, page 619, as to extension of time for filing transcript, providing that no such order shall extend it beyond the next term of the appellate court, the expiration of such term automatically ends the right of defendant to file his transcript, whether or not specified by order.

Appeal and Error—Rights on Appeal—Liberal Construction.

8. An appeal being a remedy, the laws and actions of courts in respect thereto should be liberally construed with a view to make the remedy effective.

ON THE MERITS.

Appeal and Error—Right of Appeal—Payment of Costs.

9. The mere fact that costs on former appeal have not been paid does not entitle the defendant to dismissal of the appeal in the absence of showing that the costs cannot be collected.

Evidence—Crossing Accidents—Admissibility.

10. In action for death of traffic officer when struck by auto truck, it was not error to admit statement of witness as to what seemed to him to have been the circumstances where he used the expression as the equivalent of "as I saw it."

[As to admission of opinion evidence of witness as to whether a person's conduct was "careless," "negligent," or "reckless," see note in Ann. Cas. 1913C, 1077.]

Appeal and Error—Scope of Review—Preservation of Exceptions.

11. A party who fails to move to strike out an answer to a question has no cause for complaint that the testimony was admitted.

Evidence—Crossing Accidents—Admissibility.

12. While, as a general rule, a witness must testify to facts and not conclusions or opinions, yet, in action for death of traffic officer when struck by auto truck whose tires were of peculiar make and the tracks of which could not be reproduced, a witness could say that the tracks found fitted the tires of defendant's automobile.

Evidence—Province of Jury—Disregarding Testimony.

13. The jury need not accept as conclusive uncontradicted statements of any witness, and it may disregard undisputed testimony if unsatisfactory.

Municipal Corporations — Crossing Accidents — Questions for Jury—Evidence.

14. Evidence *held* to present a jury question whether driver of defendant's automobile truck was negligent in turning to the left before crossing an intersection, and in so doing killing the traffic officer stationed at such intersection.

Municipal Corporations — Injuries to Persons — Instructions — Care Required.

15. In action for death of traffic policeman when struck by auto truck, instruction precluding recovery if the policeman was negligent, and that the jury could consider that he had duties to perform, and could not look after himself as an ordinary pedestrian, is not objectionable as imposing less than the ordinary degree of care upon the officer, where the court further instructed the jury to consider all the circumstances.

Trial—Instructions.

16. Instruction that the jury is supreme in the realm of fact, and that the court is supreme in the realm of law, whether it correctly states it or not, is proper.

Trial—Instructions—Repetition.

17. Refusal of requested instructions which, in so far as they conform to the law, were covered by charges given, was not error.

Costs—Dilatory Appeal—Damages.

18. Where an appeal was taken in good faith and with probable cause, the respondent is not entitled to 10 per cent of the judgment as damages for delay.

From Multnomah: HENRY E. MCGINN, Judge.

This is an action by Lulu R. White, administratrix of the estate of James R. White, deceased, against East Side Mill and Lumber Company, a corporation, to recover damages for an injury that caused the death

of plaintiff's husband. From a judgment in favor of plaintiff for $6,000, defendant appeals. On respondent's motion to affirm judgment. Motion overruled.

(See, also, 81 Or. 107, 155 Pac. 364, 158 Pac. 173, 158 Pac. 527.)

In Banc. Statement by MR. JUSTICE BURNETT.

In this case a judgment was rendered in the Circuit Court in favor of the plaintiff on October 6, 1916. On the 21st of that month defendant served its notice of appeal which was perfected on the 31st. No transcript having been filed in this court, the plaintiff moves for an affirmance of the judgment on the ground that the appeal has been abandoned. Resisting this motion the defendant shows that the Circuit Court made an order on December 18, 1916, which, omitting the title of the cause, here follows:

"The above entitled cause having come on regularly to be heard upon motion of Hamilton Johnstone, Esq., one of the attorneys for the above named defendant; and it appearing to the Court that heretofore, to-wit, on October 21, 1916, the said Hamilton Johnstone, Esq., having appeared in open court before me in support of a motion for extension of time within which to file transcript on appeal in the Supreme Court, and within which to file and settle bill of exceptions herein, the said defendant appearing on said October 21, 1916, by said Hamilton Johnstone, its attorney, and plaintiff appearing by R. A. Sullivan, Esq., her attorney; and it further appearing that the court on said October 21, 1916, did order that the defendant be allowed an extension of time from day to day in this cause within which to file a transcript on appeal in the Supreme Court and to file and settle bill of exceptions herein, but that no written memorandum of said order was made on October 21, 1916, and entered in the journal of this court, and the court having at the time of said order assured Hamilton Johnstone, Esq., attorney for said

defendant, that no advantage would be taken of him or said defendant because of any delay in procuring extension of the stenographic notes of the testimony taken at the trial of the above cause; and it further appearing that the reason for the failure of the defendant heretofore to file a transcript on appeal and to file and settle bill of exceptions is due to no fault of the defendant or its attorneys, but to the unavoidable pressure of business devolving upon the court reporter of this department; and the court being fully advised in the premises—

"IT IS HEREBY ORDERED that said defendant have and it is hereby granted an extension of time to a date ten (10) days from and after the date when the court reporter of this department shall file in this court a typewritten extension of the stenographic notes of the testimony taken at the trial of the above-entitled cause, within which to file a transcript on appeal in the Supreme Court, appealing from the judgment heretofore rendered in the circuit court of the state of Oregon, for the county of Multnomah, in this action, and within which to file and settle bill of exceptions herein.

"AND IT IS FURTHER ORDERED that this order be made and entered *nunc pro tunc* as of October 21, 1916, the date when this court made said order.

"Dated Portland, Oregon, December 18, 1916.

"(Signed) HENRY E. MCGINN, Judge."

MOTION OVERRULED.

Mr. Raymond A. Sullivan, for the motion.

Messrs. Asher & Johnstone, contra.

MR. JUSTICE BURNETT delivered the opinion of the court.

In the act of February 28, 1913, it is laid down as a rule that:

"If the transcript or abstract is not filed with the clerk of the appellate court within the time provided,

the appeal shall be deemed abandoned, and the effect thereof terminated, but the trial court or the judge thereof, or the supreme court or a justice thereof, may, upon such terms as may be just, by order enlarge the time for filing the same; but such order shall be made within the time allowed to file transcript, and shall not extend it beyond the term of the appellate court next following the appeal."

Earlier in this enactment it is said:

"Upon the appeal being perfected the appellant shall, within thirty days thereafter, file with the clerk of the appellate court a transcript or such an abstract as the law or the rules of the appellate court may require, of so much of the record as may be necessary to intelligently present the question to be decided by the appellate tribunal, together with a copy of the judgment or decree appealed from, the notice of appeal and proof of service thereof, and of the undertaking on appeal. * * "

1. In the present juncture there is a wealth of affidavit on both sides declaring the versions of respective counsel of what occurred in the Circuit Court on October 21st. With these in that respect we are not concerned as they amount to mere bickerings between court and counsel. The order above quoted being the solemn act of a court imports absolute verity which we cannot question. Therefore, the matter must be determined by the proper construction to be given to that judicial utterance. It is contended that in fact the court made no order on the date last mentioned. But the certified exemplification before us declares in these words:

"That the court on said October 21, 1916, did order that the defendant be allowed an extension of time from day to day in this cause within which to file a transcript on appeal in the supreme court and to file and settle bill of exceptions herein."

It is argued that this is of no effect because made before the commencement of the thirty-day period. The statute, indeed, says that "such order shall be made within the time allowed to file the transcript." This language, however, has been construed in *Wolf* v. *City Ry. Co.*, 50 Or. 64 (85 Pac. 620, 91 Pac. 460, 15 Ann. Cas. 1181), and in *Vincent* v. *First Nat. Bank*, 76 Or. 579 (143 Pac. 1100, 149 Pac. 938). In the latter case the court said:

"The contention made that this order can only be made after the appeal has been perfected and before the time to file the transcript has expired, we think not sound. This construction is far too narrow. The context shows that it was meant that the order should be made before the time had expired to file the transcript, and not to restrict it to the time after the appeal had been perfected. We think this order was made within the proper time."

2. Substantially the same language is used in the Wolf Case. In that instance several orders were made each before the expiration of the time specified in the one next preceding, so that the time was extended on several occasions and yet this court held that it had jurisdiction.

3. Having shown that the order was actually made on October 21st, allowing extension of time from day to day we next consider the effect of that order. "From day to day" means from one day to its succeeding day: 2 Words & Phrases (2 Series), 671. It must be held, therefore, that the court's order operated to extend the time from day number 1 to day number 2 and from that to number 3, and thenceforward, and was limited only by the provision that the time shall not be extended beyond the next term of the appellate court. The order was self-executing so as to carry the time

on day by day with the restriction noted. The court did not say that the time should be extended from October 21st to October 22d, in which event it would have been necessary to make a second order on the latter date and so following. But a fair construction of the judicial direction would be that without further order the time would go on day after day until it reached the legal limit noted. The effect of this is to retain within the bosom of the Circuit Court jurisdiction to make further order respecting the matter under consideration, provided it was made before the statutory lapse of the extension already granted.

We come then to the force of what was done December 18th. It is urged against the order quoted that it does not enter of record *nunc pro tunc* the same order that the court says it made on October 21st. More concretely explained the contention is that whereas the court should have again declared that "the time is extended from day to day" without saying more, it entered a different direction, viz., that the defendant have an extension of time to a date ten days from and after the date when the court reporter shall file extension of his stenographic notes of the testimony.

4–8. A journal entry is the prescribed memorial of what the court actually did. It must speak the real truth. If the court did not in fact make an order on the earlier date, one cannot be supplied by any subsequent journal entry. Moreover, the authority to make an order *nunc pro tunc* cannot be used to amend or change the order actually made. Here, however, we have spread upon the journal on December 18th, the statement that:

On October 21st the court "did order that the defendant be allowed an extension of time from day to day in this cause within which to file a transcript on appeal

in the supreme court and to file and settle bill of exceptions herein."

By this recital written upon the journal by authority we are officially informed that the court made the order quoted. In precise words we have a memorial of what the court actually did on October 21st, and it is sufficient as a *nunc pro tunc* order to show that on December 18th jurisdiction to make further order respecting the time was within the breast of the Circuit Court. Thus empowered, the trial judge had a right to make a new order as was done in the Wolf Case differently declaring the time within which the transcript might be filed. Consequently he was within the sanction of the law when he said:

"It is hereby ordered that the said defendant have and it is hereby granted an extension of time to a date ten days from and after the date that the court reporter of this department shall file in this court a typewritten extension of the stenographic notes of the testimony taken at the trial of the above entitled cause within which to file a transcript on appeal in the supreme court."

The quoted extract from the journal of the court operates not only as a *nunc pro tunc* order, but likewise as a new order further declaring the limits of time within which the transcript may be filed. Of course all this is subject to the limitation established by the statute to the effect that the time shall not be extended beyond the succeeding term of the appellate court. Without anything further being said, the expiration of that term will automatically end the right of the defendant to file its transcript. An appeal is a remedy and the laws and actions of courts in respect thereto should be liberally construed with a view to make the remedy effective. The Circuit Court evi-

dently intended to grant an extension of time. We cannot presume that the judge arbitrarily held out allurements to the defendant as to a Tantalus, that its right to appeal should be protected, yet at the same time intending to let the privilege lapse by limitation.

We conclude, then, that as a matter of fact the court on October 21st made an order extending the time "from day to day"; that this operated without further direction of the court to continue the matter subject to the restriction prescribed by law relating to the next term of the appellate court; that the effect was to retain in the bosom of the Circuit Court the right to make further orders relating to the extension of time; that the journal entry of December 18th operates not only as an official statement of what was indeed transacted on October 21st, but also as a further order controlling the matter to the present time. The motion to affirm the judgment is overruled and the application of the defendant to cure the diminution of record is allowed. MOTION OVERRULED.

Affirmed May 1, 1917.

ON THE MERITS.

(164 Pac. 736.)

In Banc. Statement by MR. JUSTICE BEAN.

This is an action by plaintiff, Lulu R. White, as administratrix of the estate of James R. White, her deceased husband, to recover damages for a personal injury to him whereby he lost his life. The cause was tried before the court and a jury resulting in a verdict and judgment for $6,000 in favor of the plaintiff. Defendant appeals.

The gist of the complaint is that on November 17, 1914, the decedent was a traffic officer in the City of Portland, stationed in the middle of the intersection of East Burnside Street and Union Avenue; that an auto truck of defendant driven by one Mergens was carelessly and negligently driven against him causing his death; that it was the duty of the driver of said truck to proceed at a reasonable speed and that he drove at a rate greater than was safe and proper; that in driving the truck from Union Avenue east on Burnside Street, it was his duty while the auto was being so turned to the left, to run to and beyond the center of the intersection of such streets, at which point James R. White, the deceased, was then standing and directing traffic as a police officer; that defendant's servant did not drive the truck to and beyond the center of the intersection of said streets but operated it directly over and across the center of the intersection thereof over the point where James R. White was then standing, and ran into and struck him, knocking him with great force to the pavement and causing the injuries which resulted in his death. It is further alleged that the seat of the auto truck was negligently inclosed at the rear and on both sides with a hood, which prevented the driver from looking to the rear and sides and ascertaining the condition of the traffic. The defendant answered admitting that the decedent was killed by a collision with the truck driven by its servant, but denied all the allegations of negligence on its part, and alleged contributory negligence upon the part of the traffic officer in turning his back to the auto and stepping backwards in front of the automobile as it passed him, thereby causing the accident. The reply put in issue the new matter of the answer in

so far as it was in conflict with the allegations of the complaint.

Section 10 of the traffic ordinance of the City of Portland, which is pleaded, requires that all vehicles approaching a street intersection with the intention of turning shall, in turning to the left run to and beyond the center of the intersection of such streets.

Section 18 enacts that "the rate of speed of all vehicles within the congested district shall not exceed fifteen miles per hour and shall at no time be greater than is reasonable and proper, having regard to the safety of the public, the traffic or use of the streets or highways then being traveled."

The intersection of Union Avenue and East Burnside Street is within the congested district of the city of Portland. There is a double track street railway on East Burnside Street and on Union Avenue leading from the north, diverging east and west on the former street. The auto truck mentioned was a four-ton truck with a 50 per cent overload. The wheel base was 16 feet, the total length being about 25 feet.

AFFIRMED.

For appellant there was a brief over the name of *Messrs. Asher & Johnstone,* with an oral argument by *Mr. Hamilton Johnstone.*

For respondent there was a brief and an oral argument by *Mr. Raymond A. Sullivan.*

MR. JUSTICE BEAN delivered the opinion of the court.

9. Counsel for defendant moved the court to strike the case from the trial docket for the reason that the costs upon the former appeal (see 81 Or. 107, 155 Pac. 364, 158 Pac. 173, 158 Pac. 527), and those upon the trial in

the Circuit Court had not been paid. This was refused and the ruling constitutes the first assignment of error. This court denied a similar motion in 1894 in the case of *Osmun* v. *Winters,* 25 Or. 260, 274 (35 Pac. 250). There the ruling was in consonance with Article I, Section 10 of the Constitution which provides that:

"Justice shall be administered openly and without purchase, completely and without delay, and every man shall have remedy by due course of law for injury done him in his person, property or reputation."

This is not a second or a vexatious action. Defendant contends that if plaintiff had shown that she was too poor to pay the costs, the trial of the cause might properly have proceeded. On the other hand, there is no showing that the costs cannot be collected from the estate or that defendant will be injured. There was no error in denying the motion.

10. The third, fourth and fifth assignments of error involve the reception of certain evidence over defendant's objection and exception. Harry Root, a witness for plaintiff, in describing the approach of the truck, testified as follows in part:

"Q. What did the truck do then?

"A. It came down—well, it came down about here [indicating], in here, some place, and gave a very sharp turn, bringing the fore wheels just almost inside this track here [indicating], and, and, then the rear wheels, it being such a long truck, came over and struck the officer. There was a pipe in front of the front wheels that seemed to control the feed, an oil pipe that seemed to feed the chain—

"Q. [Interrupting.] The front truck?

"A. I mean, the rear wheel. There seemed to be an oil pipe sticking out there that caught the officer and threw him. * *

"Q. Tell, Mr. Root, just what you saw there.

"A. Well, the truck turned down there, and naturally the rear wheels came between him and I, but the part that seemed to strike him was that pipe."

Objection was made that the witness "should state just what he saw, not his conclusion of what 'seemed' to be there." After some argument and the third objection, the trial court explained that "I take it that the witness uses the term 'seems' when his judgment of the thing is that he saw it." We think the language of the witness was to the same effect as though he had said "it appeared to me" or "as I saw it," and that the evidence was not an expression of an opinion or conclusion, and that the ruling was correct. We fail to see that it was very material whether the part of the machine in front of the rear wheel, was a guard-rail, oil pipe, or a part of the chain attachments. The evidence indicated that the decedent was struck by the part of the truck in front of the rear wheel.

11. Sam Goldeen, who was sitting in a machine about 50 feet away on Burnside Street and saw the accident happen, testified for plaintiff to the effect that there was a traffic officer standing right in the center of the street; and that on Union Avenue north of East Burnside Street there was a truck standing up even with the property line, and quite a ways out from the west curb far enough to have one wheel on the street-car track.

To the question, "What did you see happen there, Mr. Goldeen?" he answered:

"Well, the traffic officer motioned for him to come ahead and he came right straight down here. I thought he was going to our right straight ahead, the way I was looking at him, on account of the way he turned this corner. He went down there cramping his

wheels and he shot right straight up this track. You could see that he didn't go right straight up that track [indicating] there—"

The witness further testified in substance that before the machine started the officer was facing north and then turned around facing south; that the truck came down with its front wheels a little beyond the center of the intersection; that the driver then turned east with his wheels on the track, the back ones over the track and the front ones just about straddling each rail; that in making the turn the truck did not run to and beyond the center of the intersection of those streets; that he judged the left rear hind wheel of the truck went about 2 or 3 feet north of the intersection; and that as the truck attempted to make the turn the officer was struck and run over. While, as we understand, the witness' first statement in regard to the officer being struck was his way of expressing what he saw, yet the ruling of the court was favorable to the defendant and the witness changed his answer to the emphatic statement that "the officer was struck and run over." Further, there was no objection to the question and while a request was made for counsel for plaintiff to consent to the striking out of the answer objected to no direct motion was made to that effect for the court to rule upon, which was the proper remedy. For these three reasons defendant has no cause for complaint. The authorities cited do not apply.

Henry W. Norene, a police officer and a witness for plaintiff, testified that after the accident happened he followed the truck about three blocks and brought it back to the street crossing, and about thirty or forty minutes after the injury he examined the tracks at the intersection of the streets mentioned.

To the question, "What kind of marks did you see on the pavement of this street intersection, Mr. Norene?" he replied:

"Why, there were blotches in the dust that would be made by tires of that kind of wheels."

To the further interrogatory, "What did you discover in regard to any marks upon that street intersection?" he answered:

"I traced the tracks that the rear wheels had taken, especially the left rear wheel."

Upon motion of defendant's counsel plaintiff's attorney consented that the part of the answer as to what wheels made the tracks be stricken out as a conclusion.

In answer to the question, "What kind of marks did you see on the pavement of this street intersection, Mr. Norene?" he said:

"Why, there was blotches in the dust that would be made by tires of that kind of wheel."

Upon a motion of counsel for defendant to strike out the latter part of the answer the court held that the evidence came within the ruling in *Commonwealth* v. *Sturtivant,* 117 Mass. 122, that as the marks were effaced and could not be reproduced or described to the jury precisely as they appeared to the witness who examined them at the time, he might give his conclusion for the consideration of the jury. Counsel for defendant saved an exception to this ruling.

12. As a general rule a witness must testify to facts and not to conclusions or opinions in order that the jury may draw inferences from the evidence and conclusions from the facts presented. There are exceptions to this rule founded upon necessity, for the reason that the facts cannot be reproduced or depicted to the jury

precisely as they appeared to the witness, and from the nature of the subject it is impractical for him to relate what he may have seen without supplementing his description with his conclusion. Under such circumstances a common observer, although not an expert, may testify to his opinion or conclusion regarding what he has seen: *First Nat. Bank* v. *Fire Assn.*, 33 Or. 172 (53 Pac. 8); *State* v. *Barrett,* 33 Or. 194 (54 Pac. 807); *Everart* v. *Fischer,* 75 Or. 316, 328 (147 Pac. 189). An exception to the general expert evidence rule is the admissibility of testimony in regard to the identity and appearance of persons and things, respecting which facts, when personally observed by any one of maturity and ordinary intelligence, he may express an opinion: *Weiss* v. *Kohlhagen,* 58 Or. 144 (113 Pac. 46); *Kitchin* v. *Oregon Nursery Co.,* 65 Or. 20, 25 (130 Pac. 408, 1133, 132 Pac. 956); *Kelly* v. *Weaver,* 77 Or. 267, 271 (150 Pac. 166). The evidence objected to comes within the exception to the general rule. It would have been practically impossible for the witness, whether lawyer or layman, to describe the auto truck tire which appears from the photo to be a kind of double nonskid type, and the marks in the dust, both of which he had seen, so that the jury could determine whether the tracks were made by the truck. The evidence was not vital. Other eye-witnesses to the casualty delineated the course taken by the auto truck at the time. There was no error in denying the motion to strike out the evidence.

13, 14. At the close of plaintiff's evidence in chief, counsel for defendant moved the court for a nonsuit and at the proper time requested the court to direct a verdict in favor of defendant. These requests may be considered together. The question involved is the crux of this case. In addition to the evidence above referred to

the testimony tended to show that at the time of the accident complained of, in making the turn to the left at the intersection of Union Avenue and East Burnside Street the defendant's driver did not run to and beyond the intersection of the streets named before turning, according to the direction of the city ordinance, but negligently ran the truck at a high rate of speed so that the front part of the same was slightly past the street center, and then turned and ran to the left causing the truck to run over the center of the street intersection where plaintiff's intestate was stationed in the performance of his duty as a traffic officer; and that the part of the truck in front of the left rear wheel struck White, knocked him down and the wheel ran over and killed him. Counsel for defendant do not question that the evidence on the part of the plaintiff tends to show such facts, but submits that "uncontradicted and unimpeached testimony shows it was a physical impossibility for the left rear wheel of the auto truck to take the courses marked on the maps by Root and Goldeen." The material point is that the defendant's servant drove the truck against the decedent in the center of the intersection of the streets where he was in the performance of his duty in violation of the ordinance of the city, which suggestion is a sufficient answer to this argument. What route the truck took, where it started from to get to the center of the street, whether the witnesses for plaintiff marked the course of the left rear wheel on the map correctly, or whether Clark, defendant's expert, was correct, are matters of secondary consideration. It was for the jury to settle the minor discrepancies in the evidence and determine what was the actual truth as to the main facts. A jury is not bound to accept as conclusive the uncontradicted statements of

any witness; they may disregard undisputed testimony if it is unsatisfactory to them: *Taffe* v. *Oregon Ry. & Nav. Co.*, 60 Or. 177 (117 Pac. 989); *Graham* v. *Coos Bay R. & N. Co.*, 71 Or. 393 (139 Pac. 337). We have no duty pertaining to the weight of the testimony. Suffice it to say that the evidence tends directly to show that the auto truck was not run to and beyond the center of the intersection of the streets before turning, and to sustain the allegations of the complaint. Whether the witnesses were exactly correct in all the details would not prevent the jury from segregating the evidence and finding where the preponderance was: *Sullivan* v. *Wakefield*, 59 Or. 401 (117 Pac. 311); *Jones* v. *National Laundry Co.*, 66 Or. 218 (133 Pac. 1178); *Dickerson* v. *Eastern & W. Lumber Co.*, 79 Or. 281 (155 Pac. 175); *Johnson* v. *Portland Ry. L. & P. Co.*, 79 Or. 403, 408 (155 Pac. 375); *Childers* v. *Brown*, 81 Or. 1 (158 Pac. 166). The evidence on this and other points was amply sufficient to be submitted to the jury. There was no error in denying the defendant's motion for a nonsuit nor in refusing the request for a directed verdict for the defendant.

15. Defendant complains of the charge given to the jury. The court in effect told the jury that for the plaintiff to recover, the death of White must have been caused by the sole negligence of the defendant, which sole negligence must have been the proximate cause of his death; that to constitute negligence there must be a want of reasonable care which a person of ordinary prudence would have used under the existing circumstances; that if they found that White himself was negligent and that his negligence contributed in any way to bring about his death, that is, if the combined negligence of both him and the defendant brought about his death there could be no recovery. The court

also instructed the jury in substance that a man must exercise his senses of hearing and seeing and everything of that kind for his personal safety and protection; but that it should take into account that "that man, as a traffic officer had duties to perform there, other than looking after his own personal safety," and that he "had the right to expect that those traveling those streets would take into consideration the fact that he had duties to perform there, and that he could not look after himself as would one who had nothing to do but walk around those streets." Defendant objects and excepts to the portion of the charge quoted, particularly as to the degree of care required of plaintiff's husband. Upon this phase of the case defendant requested the court to instruct the jury as follows:

"Negligence is defined to be the want of ordinary care; that is, such care as an ordinarily prudent person would exercise under like circumstances, and it should be proportioned to the danger and peril reasonably to be apprehended from a lack of the proper prudence. A person must use his faculties in proportion to the danger of his employment, and must use every reasonable precaution to provide for his safety and such as an ordinarily prudent man under the same circumstances would do."

We compare the charge given with the request of the defendant and are unable to distinguish any material difference in regard to the part complained of. The language used by the court was more closely applied to the case. In plain terms the court instructed the jury to take into consideration the surrounding circumstances of the place. Ordinary care would suggest more vigilance by the same person upon a crowded thoroughfare than in a secluded spot. We should not confound the alertness which ordinary care and prudence would demand of a reasonably careful person

in a place of danger, with the care itself. Great danger requires great vigilance: *Savoy* v. *McLeod,* 111 Me. 234. We do not agree with the suggestion of the learned counsel, if such was intended, that the instruction given required less than ordinary care on the part of the traffic officer. The charge indicated that it was the duty of the officer to use ordinary care for his own protection, the degree of which is commensurate with the danger to be avoided: *Carroll* v. *Grande Ronde E. Co.,* 47 Or. 424 (84 Pac. 389, 6 L. R. A. (N. S.) 290); 11 Thompson, Neg., § 1463; 1 Shearman & Red., Neg. (6 ed.), § 87; *Graves* v. *Portland Ry. L. & P. Co.,* 66 Or. 232–234 (134 Pac. 1, Ann. Cas. 1915B, 500).

The charge enjoined no less a degree of care on the part of the officer than it did upon the defendant's driver of the auto truck. The chauffeur should have been watchful and should have known that in making a turn the rear wheels of a vehicle do not follow exactly in the course as the front ones. As the jury must have found, there was plenty of room to turn the machine at the street intersection without running over the center and striking the officer while he was at his place of duty. Indeed, it is difficult to see how the jury could have found otherwise from the evidence. The facts in the case at bar differ widely from those in the cases of *Clark* v. *Boston & Albany R. R. Co.,* 128 Mass. 1, and *Loettker* v. *Chicago City Ry. Co.,* 150 Ill. App. 69, cited by the defendant. From the two decisions cited the only variance in law which we can discern, as given the jury by the trial court, is a mere matter of phraseology. The instruction to the jury was in plain language and fairly submitted the question to them. The duty of the traffic officer required him to be at the center of the intersection where the evidence tended to show, and the jury found, that he

was. In the ordinary course of affairs he would not expect that a vehicle would be run over the center of the intersection contrary to the law, and he could not be expected to be looking in both directions at the same time.

16. It is asserted by defendant that the court erred in charging the jury as follows:

"You are supreme in the realm of fact. Just as supreme as you are in the realm of fact, just so supreme is the court in the realm of law. He may not correctly have stated the law which is to govern you, and he may be far afield. Be that as it may, there is a tribunal appointed by law to correct him if he is in error. You are not that tribunal."

17. This was in effect the usual and proper direction and caution to the jury. The requested instructions in so far as they conform to the law were covered by the court's charge and there was no error in refusing those not given: *State* v. *Branson,* 82 Or. 377 (161 Pac. 689); *Pilson* v. *Tip-Top Auto Co.,* 67 Or. 537 (136 Pac. 642); *Powder Valley State Bank* v. *Hudelson,* 74 Or. 191 (144 Pac. 494).

18. We have examined other assignments of error which we do not deem require further discussion. Application is made by plaintiff for damages to the amount of 10 per cent of the judgment for the delay caused by this appeal. We cannot say the appeal was not taken in good faith. There was probable cause therefor, and the application is denied.

Finding no error in the record the judgment of the lower court is affirmed. AFFIRMED.

Argued March 22, affirmed April 3, rehearing denied May 15, 1917.

EVANS *v.* MERIDIAN INVESTMENT & TRUST CO.

(163 Pac. 1165.)

Municipal Corporations—Special Assessments—Reassessments—Purchaser at Void Sale.

1. As a purchaser at a void sale for street assessment buys at his peril, and has no such equities as entitle him to be reimbursed by the property holder for the sum paid by him, a city may not reassess the property to obtain a fund from which to reimburse such purchaser.

From Multnomah: WILLIAM N. GATENS, Judge.

The plaintiff, Mary H. Evans, commenced a suit to quiet title against the Meridian Investment & Trust Company, now known as the Meridianal Company, a corporation, and the City of Portland. From a decree in favor of plaintiff, defendants appeal. Affirmed. Rehearing denied.

Department 2. Statement by MR. CHIEF JUSTICE MCBRIDE.

This is a suit to quiet title to lot 8, block 51, in the town of Albina, now within the corporate limits of the City of Portland. The complaint was in the usual form. The defendant answered, and its answer being held insufficient by the court it obtained leave to file a further answer, and also asked and obtained relief to have the City of Portland brought in as a codefendant. The amended answer admitted all of the allegations of the complaint, except that it denied that the defendant Meridianal Company had no interest, estate, or claim in the property. The answer then set up the facts showing in detail the proceedings for improving Albina Avenue and making an assessment on said property, and alleged that upon sale the Meridianal

Company paid the amount bid at such sale, $144.57, and received a treasurer's certificate of sale therefor, and that the plaintiff has never paid said assessment or redeemed said property. It further stated that David Brown, John Mitchell, Mary Evans, plaintiff herein, and other plaintiffs, filed a petition in the Circuit Court of Multnomah County for a writ of review to review the proceedings of said city relative to said reassessment, and thereupon an alternative writ was issued from that court and a return thereto filed, containing a transcript of the proceedings relating to said reassessment, whereby said court found said proceedings to be regular and valid; that said plaintiff took an appeal to this court, which about December 1, 1914, rendered an opinion and decision with reference to said proceedings, holding that the council in passing the ordinance making such reassessment erred in failing to make a record showing in detail its findings of fact relative to the objections made and filed with the auditor by the plaintiff *et al.* against the preliminary reassessment for said improvement; that on or about the same date a mandate was issued requiring the Circuit Court to enter a judgment canceling and annulling said ordinance, directing the city to take proceedings not inconsistent with said opinion, and authorizing it to give further notice of a hearing upon said preliminary reassessment, to proceed to make findings of fact upon such objections, and to pass another ordinance making such reassessment; that on January 25, 1915, the plaintiff, responding to said notice, filed written objections to the reassessment proceedings, and contended the city had sold the property as related to defendant without any right or authority; that all of the proceedings herein set out and said sale were void, and that by reason of the sale and the certificate here-

inbefore described all of plaintiff's reassessment and lien on said property had been paid and satisfied, and that all possibility of claim for assessment or reassessment on behalf of said city against said property has been paid and satisfied; that the council determined all of plaintiff's objections to the reassessment proceedings adversely to plaintiff. The answer then recites the passage by the council of ordinance No. 30,287, making a reassessment, which it was alleged was a valid reassessment of the property, and of an ordinance providing for the payment to the Meridianal Company upon certain conditions of the amount paid by it upon the attempted sale of the property. Said pleading alleged that by reason of the premises the defendant had an equitable right or interest in the property to the extent of the lien reassessed against it, and that in justice and equity it was subrogated to the rights of the City of Portland in and to the proceeds of the amount which has been levied against the property, and prayed for relief accordingly. Upon motion of plaintiff the new matter in defendant's answer was stricken out, and thereafter a decree was entered against the defendant Meridianal Company as prayed for in the complaint. The city answered setting up in detail the same defenses urged by the Meridianal Company and, in effect, asserting its right to sell the property upon the last reassessment for the purpose of reimbursing the Meridianal Company for the sum paid by it at the void sale. On October 9th a general demurrer was filed to the answer of the City of Portland, which was sustained, and on October 15, 1915, a decree was entered against the defendant City of Portland in accordance with the prayer of the complaint. From these decrees the Meridianal Company and the City of Portland both appealed.

AFFIRMED. REHEARING DENIED.

For appellant, Meridianal Company, there was a brief and an oral argument by *Mr. Robert C. Wright.*

For appellant, City of Portland, there was a brief over the name of *Mr. Walter P. La Roche,* City Attorney, and *Mr. Lyman E. Latourette,* with an oral argument by *Mr. Latourette.*

For respondent there was a brief and an oral argument by *Mr. Ralph R. Duniway.*

Opinion by MR. CHIEF JUSTICE MCBRIDE.

1. The matter of this street assessment has been so long pending that it has attained the character of a genuine antique. In 1903 the City of Portland attempted to assess plaintiff's property for an improvement of Albina Avenue. The assessment was resisted and set aside by the court. It then attempted to make a reassessment, which was adjudged void in the case of *Applegate* v. *City of Portland,* 53 Or. 552 (99 Pac. 890), and the city directed to proceed to reassess the property. Thereupon the city endeavored to make another reassessment, but this was resisted and adjudged invalid in *Brown* v. *City of Portland,* 73 Or. 302 (144 Pac. 121), and the case sent back with permission to the city again to reassess the property. The case of *Brown* v. *City of Portland* was heard first in the Circuit Court of Multnomah County, and the proceedings there adjudged to be valid, from which decision the property owners took an appeal to this court. While this case was pending here, the City of Portland directed a city treasurer's sale, and at said sale the Meridianal Company bid in the property paying the full amount of the alleged assessment. It is undisputed that the sale was wholly void and passed no title

to the purchaser, and the principal question here is whether the city can reassess to obtain a fund from which to reimburse the purchaser at the void sale. The uniform holding of this court has been that a purchaser at a void sale for street assessments buys at his peril, and that he has no such equities as entitle him to be reimbursed by the property holder for the sum paid by him: *Dowell* v. *City of Portland,* 13 Or. 248 (10 Pac. 308); *Keenan* v. *City of Portland,* 27 Or. 544 (38 Pac. 2); *Gaston* v. *Portland,* 41 Or. 373 (69 Pac. 34, 445); *Gaston* v. *Portland,* 48 Or. 82 (84 Pac 1040); *Hughes* v. *Portland,* 53 Or. 370 (100 Pac. 942); *Barkley* v. *Lincoln.* 82 Neb. 181 (117 N. W. 398, 130 Am. St. Rep. 659, 18 L. R. A. (N. S.) 392). In *Gaston* v. *Portland, supra,* and again in *Hughes v. Portland, supra,* this court held that that part of Section 400 of the Charter of the City of Portland providing for the reassessment of property which had been theretofore sold under void assessments for the purpose of reimbursing the purchaser at such sale was void; the court using the following language:

"That part of Section 400 providing that, when the property has been sold for the payment of a delinquent assessment and the sale has been declared void, the property shall be reassessed and the proceeds paid to the purchaser in the prior sale, is unconstitutional and void, because it is, in effect, the taking of one man's property and giving it to another."

This disposes absolutely of the proposition that the City of Portland had any right to make a reassessment of plaintiff's property after the void sale. The defendant Meridianal Company stands in the position of a volunteer who has paid the tax of the defendant City of Portland at its own risk. It, therefore, cannot claim reimbursement either as a matter of law or for any equitable reason. A different rule has been inti-

mated by this court in respect to the sales for ordinary taxes, which are in their nature of a character necessary for the support of the government and for the exercise of its functions, but this rule has never been extended and never will be extended to proceedings of this character, which are strictly *in invitum* and in favor of which no equities have ever been declared by this or any other court. The decree of the Circuit Court is affirmed.

AFFIRMED. REHEARING DENIED.

MR. JUSTICE MOORE, MR. JUSTICE BEAN, and MR. JUSTICE MCCAMANT concur.

Submitted on briefs April 6, reversed and remanded April 17, rehearing denied May 15, 1917.

HINDERLITER *v.* McDONALD.

(164 Pac. 378.)

Money Lent—Admissibility of Evidence.

1. It is competent to establish by parol testimony that money was borrowed, irrespective of the purpose to which it was to be applied.

[As to parol evidence of the circumstances of a transaction and the conduct of the parties, see note in 11 **Am. St. Rep.** 894.]

Money Lent—Pleading—Construction.

2. Under a complaint that plaintiff advanced money for defendant to pay his share of a mining claim they had agreed to purchase, the allegation regarding the agreement to purchase the mining claim is material and must be proved by competent evidence, since the advance of money was merely incidental for that purpose.

Frauds, Statute of—Mining Claim.

3. Section 5132, L. O. L., making mining claims real estate, Section 5134, making mining claims conveyances, subject to provisions governing other realty, and Sections 804, 808, requiring conveyances, etc., of real estate to be in writing, prevent oral proof of an agreement to purchase a mining claim interest.

Money Lent—Sufficiency of Evidence.

4. Plaintiff cannot recover for money advanced for defendant to pay his share of a mining claim interest they had agreed to purchase and own together, where plaintiff took the title to the entire interest in his own name.

From Josephine: FRANK M. CALKINS, Judge.

This is an action by W. A. Hinderliter against W. L. McDonald in which plaintiff was the prevailing party and defendant appealed. Reversed, remanded and rehearing denied.

In Banc. Statement by MR. JUSTICE BURNETT.

The complaint in this action contains the following averment:

"That on or about the 28th day of February, 1914, in the City of Grants Pass, Oregon, the plaintiff and defendant entered into an agreement to purchase for the sum of $400.00 the 1/6 interest of one B. F. Fry in a certain group of mining claims known as the 'Afterthought Mine' located in Jackson County, Oregon, and under and by virtue of said agreement the plaintiff and defendant were to share equally in said interest and each was to pay one half of the said purchase price of Four hundred ($400.00) dollars: That at the time of said purchase the defendant requested the plaintiff to advance, to the said B. F. Fry for his 1/6 interest in said mine, one half of the purchase price, to wit, $200.00 as a loan from the plaintiff to the defendant which the defendant promised and agreed to repay to the said plaintiff within a day or so after the date of the said advancement and thereupon and in consideration of the promise to repay as aforesaid to the plaintiff as aforesaid this plaintiff and defendant did purchase said interest of Fry and this plaintiff did advance for the defendant the sum of $200.00 upon the said purchase price on the 2nd day of March, 1914."

The remainder of the pleading is to the effect that the defendant agreed to repay the plaintiff the sum of $200 within a day or so after the latter had paid it to Fry, but has not done so. The answer is a denial of all the allegations of the complaint except the nonpayment of the money demanded. At the close of the

plaintiff's case the defendant moved for a judgment of nonsuit on the ground:

"That the testimony shows that the agreement, if any existed, or whatever agreement there was between the plaintiff and the defendant was verbal, not in writing, not subscribed to by the party to be charged and was an assumption on the part of the defendant to pay the debt of another, and that the same is clearly within the statute of frauds."

The trial court overruled this motion. The jury returned a verdict for the plaintiff in the sum of $200, and interest. From the ensuing judgment the defendant appealed.

Submitted on briefs under the proviso of Supreme Court Rule 18: 56 Or. 622 (117 Pac. xi).

REVERSED AND REMANDED.
REHEARING DENIED.

For appellant there was a brief over the name of *Mr. A. C. Hough.*

For respondent there was a brief over the name of *Mr. C. A. Sidler.*

MR. JUSTICE BURNETT delivered the opinion of the court.

1–3. The contention of the plaintiff is that, reduced to its lowest terms, the complaint is for the recovery of money loaned to the defendant. It is indeed competent to establish by parol testimony that money was borrowed no matter for what purpose it was to be applied; but that is not all the complaint the excerpt from which has been quoted. We find in the first place it states that the parties to this action entered into an agreement to purchase the interest of Fry in

certain mining claims. This is a material allegation to be proved by what the statute requires as competent testimony. Section 5132, L. O. L., says:

"All mining claims, whether quartz or placer, shall be real estate, and the owner of the possessory right thereto shall have a legal estate therein within the meaning of section 325."

This last reference is to the procedure for the recovery of real estate by what is commonly known as an action of ejectment. Section 5134, as it stood at the time of the transaction in question, declares:

"All conveyances of mining claims, or of interests therein, either quartz or placer, shall be subject to the provisions governing transfers and mortgages of other realty. * * "

Further, Section 804, is here set down:

"No estate or interest in real property, other than a lease for a term not exceeding one year, nor any trust or power concerning such property, can be created, transferred, or declared otherwise than by operation of law, or by a conveyance or other instrument in writing, subscribed by the party creating, transferring, or declaring the same, or by his lawful agent, under written authority, and executed with such formalities as are required by law."

Again in Section 808 we find this:

"In the following cases the agreement is void unless the same or some note or memorandum thereof, expressing the consideration, be in writing and subscribed by the party to be charged, or by his lawfully authorized agent; evidence, therefore, of the agreement shall not be received other than the writing, or secondary evidence of its contents, in the cases prescribed by law. * * " 6. An agreement for the leasing, for a longer period than one year, or for the sale of real property, or of any interest therein. * * "

By the pleading, the advance of the money was a mere incident of an executory contract for the purchase of real property and was one of the things to be done by the plaintiff. The agreement, as stated in the complaint, contemplated that the result of the transaction when performed was to confer an estate in land upon the defendant. No writing whatever was produced showing a contract by these parties to purchase or by Fry to sell the latter's interest in the mines. Neither was there any instrument tending to show that any estate in the property was conveyed to the defendant. In point of law he has nothing to show that he has any title to or interest in the realty mentioned. Within the meaning of the extracts from the statutes, there was no competent proof that the defendant agreed to buy or that he participated in the purchase of the property. Yet all this is alleged as the basis of plaintiff's demand.

Passing this, however, we find from the record that six persons of whom the parties to this action were two and Fry a third, had possession of a mine under a written contract to purchase the same, having paid a portion of the price. The plaintiff here had advanced to Fry his part of the initial payment and had taken his note on that account for $500. After a time, Fry became dissatisfied and wished to retire from the venture. According to the plaintiff, in his oral testimony, McDonald urged him to give up to Fry his note and take over that interest. The last that was said between McDonald and plaintiff before surrendering the note was this, quoting from the latter's testimony narrated in the bill of exceptions:

"And he said, 'Go see Fry to-morrow and let him out and I will assume one half interest so we won't lose this money, otherwise you will have to lose it.' I

says, 'Just as you say, if you say you will assume it I will go and get it,' and he says, 'Yes, go on.' I says, 'Well, Bill, if that is what you mean, I will go at it, and let's settle it.' "

The plaintiff's further declaration as a witness is that he went to see Fry, surrendered the note, and took from him the following writing:

"Grants Pass, Ore., March 2nd, 1914.

"To whom it may concern:

"This is to certify that B. F. Fry, the undersigned, has by these presents sold to W. A. Hinderliter for the sum of Four hundred Dollars in hand paid sell and convey all of my one sixth (1/6) Interest in the Afterthought Group of Mining claims, situated in Jackson Co., State of Oregon, the said W. A. Hinderliter also releases the said B. F. Fry from all obligations that may have accrued against said Afterthought mining claims to date.

"Dated this 2nd day of March, 1914.

"Witness—F. G. ROPER. Seal B. F. FRY."

He also expressly says that he never gave the defendant any writing showing that the latter had any interest in the property and that he never even showed him the assignment which he took from Fry. It is plain that no money ever passed between the parties. The statute of frauds and that relating to the creation of an interest in real property are not satisfied by oral testimony as applied to the allegations of the complaint about contracting to buy the property and the subsequent actual purchase of the Fry interest.

4. Moreover, on the merits, the plaintiff shows that he did not perform the agreement which he alleges, namely, that in which both parties should join in the purchase of the claims. On the contrary, the writing which he took from Fry without reference to its legal

competency shows that whatever passed was to the plaintiff individually. To affirm the judgment would be to require the defendant to pay for something which he never received but which the plaintiff took entirely to himself. The judgment is reversed and the cause remanded to the Circuit Court, with directions to enter a judgment of nonsuit in favor of the defendant.

REVERSED AND REMANDED.

REHEARING DENIED.

Motion to dismiss appeal denied February 23, 1916.
Argued on the merits March 7, reversed and remanded March 20, 1917, rehearing denied May 22, 1917.

CAULDWELL *v.* BINGHAM & SHELLEY CO.*

(155 Pac. 190; 163 Pac. 827.)

ON MOTION TO DISMISS.

Time—Perfecting Appeal—Statutory Provisions—Sunday.

1. Under Section 550, L. O. L., as amended by Laws of 1913, page 617, providing that from the expiration of the 5 days allowed to except to the sureties in the undertaking on appeal, the appeal shall be deemed perfected, an appeal became perfected with the expiration of Monday when the fifth day after the filing of the undertaking fell on Sunday.

Appeal and Error—Filing of Transcript—Time to File.

2. Where an appeal was perfected on October 4th, a transcript filed on October 28th following was filed within 30 days after the appeal was perfected, as prescribed by Section 554, L. O. L., as amended by Laws of 1913, page 618.

Appeal and Error—Filing of Printed Abstract—Time to File.

3. A respondent who formally consented to delay in filing on appeal the printed abstract of record cannot complain of the failure to file the same within the statutory period.

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*On constitutionality, application and effect of Federal Employers' Liability Act, see notes in 47 **L. R. A. (N. S.)** 38; **L. R. A.** 1915C, 47.
REPORTER.

ON THE MERITS.

Master and Servant—Personal Injuries—Independent Contractor—Employers' Liability Act.

4. Under Employers' Liability Act (Laws 1911, pp. 16, 17), providing that all owners, contractors, subcontractors, or other persons whatsoever engaged in the construction of any building shall see that all shafts, wells, and floor openings are inclosed, and shall be liable for failure to comply with this act, etc., one having a contract to do mason work of a barn for total cost, with 10 per cent additional for superintending, and another having a contract to take immediate charge of carpenter work at a flat rate over cost of labor and materials, who are both actually engaged in construction of a barn and responsible for laying of a temporary floor over basement, are liable for fatal injuries to a servant of the latter who falls through an unguarded opening in the floor; the test of whether they are servants or contractors not being in the manner of their receiving compensation.

[As to duty and liability of master with respect to guarding shafting, see note in Ann. Cas. 1914A, 658.]

Master and Servant—Injuries to Servant—Guarding Openings in Floor—Employers' Liability Act.

5. Under Employers' Liability Act, providing that all owners, contractors, subcontractors, or other persons whatsoever engaged in the construction of any building shall see that all shafts, wells and floor openings are inclosed, and shall be liable for failure to comply with this act, etc., it cannot be held as a matter of law that a staging on top of a trestle about five feet above an opening in a temporary floor laid over basement of a barn under construction is an inclosure within the meaning of the statute.

Negligence—Violation of Statute—Evidence.

6. The violation of a statute designed for protection of others constitutes conclusive evidence of negligence or negligence *per se*.

Master and Servant—Superintendent—Employers' Liability Act.

7. Although Employers' Liability Act, Section 2, declares that a superintendent or person in charge of particular work shall be held to be the agent of the employer in cases for damages, it does not relieve a superintendent from personal liability for duties enjoined by Section 3.

Master and Servant—Employers' Liability Act—"Opening."

8. Employers' Liability Act, providing that all shafts, floor openings, etc., shall be inclosed includes an "opening" in a temporary floor laid over basement of a barn, and that one party engaged in the construction does not desire to have a permanent floor constructed till the roof is put on, does not give the other a license to neglect to fulfill the requirements of the statute.

Evidence—Independent Contractor—Building Permit.

9. In an action under Employers' Liability Act against defendant to recover damages for fatal injuries to a servant working on a barn,

an application for a permit to construct the same in which defendant designated himself as builder is admissible as evidence of his relationship to owner.

From Multnomah: GEORGE R. BAGLEY, Judge.

Action by Isabella Cauldwell against the Bingham & Shelley Company, a corporation, Thomas Muir and Joseph Clossett, in which a judgment was rendered in favor of defendants, and plaintiff appeals. Respondent, Bingham & Shelley Company, files motion to dismiss the appeal. Motion denied.

In Banc. Statement by MR. JUSTICE HARRIS.

The defendant Bingham & Shelley Company, a private corporation, moves to dismiss the appeal prosecuted by plaintiff. A judgment in favor of defendants was entered on July 29, 1915, and all that followed occurred in the same year. The plaintiff filed and served a notice of appeal on September 23, and on September 28, an undertaking on appeal was served and filed. A proposed bill of exceptions was tendered to and received by the trial judge on September 23. The bill of exceptions was settled and allowed on September 28 and it was filed with the county clerk on October 5. Certified copies of the judgment, notice of appeal and undertaking on appeal, constituting the technical transcript, were filed in this court on October 28, and on the same day the bill of exceptions was filed here. On November 17, pursuant to a written stipulation signed by the attorneys of record, the court extended the time for filing an abstract of record to and including November 29; and the abstract was filed on November 29.

MOTION DENIED.

Messrs. Sheppard & Brock and *Messrs. Stapleton & Sleight*, for the motion.

Mr. P. H. Murdock, Mr. H. E. Hall and *Mr. Arthur I. Moulton, contra.*

MR. JUSTICE HARRIS delivered the opinion of the court.

1. Within five days after the service of the undertaking on appeal the adverse party shall except to the sureties in the undertaking, or be deemed to have waived the right to except. From the expiration of the time allowed to except to the sureties, "the appeal shall be deemed perfected": Section 550, L. O. L., as amended by Chapter 319, Laws of 1913. The fifth day after September 28, when the undertaking was filed, fell on Sunday, October 3, and consequently the appeal became perfected with the expiration of Monday, October 4: *Pringle Falls Power Company* v. *Patterson,* 65 Or. 474 (128 Pac. 820, 132 Pac. 527).

2. Unless the time is extended by an appropriate order of the court the appellant must file the transcript within thirty days after the appeal is perfected: Section 554, L. O. L., as amended by Chapter 320 of Laws of 1913. The statute allows thirty days to file the transcript regardless of whether that period terminates before or after the commencement of a new term of court; and when the transcript was filed on October 28, it was filed within thirty days after the appeal was perfected. The bill of exceptions was filed in time: *West* v. *McDonald,* 74 Or. 421 (144 Pac. 655).

3. The respondents formally consented to the delay in filing the printed abstract of record and cannot now complain. See *St. Martin* v. *Hendershott,* 82 Or. 58 (151 Pac. 706). The motion to dismiss is denied.

MOTION DENIED.

Reversed and remanded March 20, 1917.

ON THE MERITS.

(163 Pac. 827.)

Department 2. Statement by MR. JUSTICE BEAN.

This is an action for damages brought under the Employers' Liability Act by Isabella Cauldwell, the widow of Thomas James Cauldwell, deceased, against Bingham & Shelley Company, a corporation, Thomas Muir and Joseph Clossett, for the wrongful death of her husband which occurred by reason of the alleged negligence of the defendants in the construction of a building owned by Joseph Clossett. The latter died soon after he appeared in the case and the action is prosecuted against the other defendants only. At the close of all the evidence the trial court directed a verdict and entered a judgment in favor of the defendants and plaintiff appeals.

The complaint alleges in part as follows: That on April 11, 1914, the defendants were jointly engaged in the construction and erection of a certain building on Twelfth Street North, in the City of Portland, Oregon; that each of them had certain parts of the erection of the structure, but that they all maintained and neglected to cover the floor opening complained of; that on the above date and for some time prior thereto, Thomas J. Cauldwell, deceased, was employed by defendant Muir as a carpenter in the erection of the building which had proceeded to the extent that there had been installed therein a ground floor about eleven feet above the concrete basement floor; that in the joint construction of said building the defendants jointly and severally, carelessly and negligently permitted a certain floor opening about thirty inches wide across

one side of the building to be wholly uncovered and unprotected which caused a great risk to the defendants' employees; that by reason of this Thomas J. Cauldwell, deceased, while working on the floor with a cant-hook which slipped, was caused to step back into the floor opening so maintained uncovered and unprotected, and fell through upon the concrete floor of the basement whereby he suffered such severe injuries that he died about twelve hours thereafter. Bingham & Shelley Company filed an answer to the complaint denying all the allegations and alleging, among other things, that Joseph Clossett was the owner of the property and had adopted plans and specifications for the erection of a building on the lots; that he had supervised its construction, had employed the defendant Bingham & Shelley Company to act as immediate foreman and superintendent, and agreed to pay it the sum of ten per cent of the cost of the building; that this company was merely acting as the agent of Joseph Clossett and was not the owner, contractor, subcontractor, corporation, or person engaged in the construction of the said building as contemplated by the Employers' Liability Act.

Defendant Muir answered alleging in substance that defendant Bingham & Shelley Company was engaged by Joseph Clossett in the erection of the building; that it employed Thomas J. Cauldwell as a carpenter, and Thomas Muir was employed by it merely as a superintendent or foreman of the carpenter work; that he was in no manner responsible for the condition of the work except as such superintendent or foreman. Muir further pleaded assumption of risk, contributing negligence, and the negligence of fellow-servants. The replies put in issue the new matter of the answers.

In addition to the general supervision of the construction of the building and the letting of the contracts for different parts of the work, purchasing materials, etc., the masonry of the stable was the special work of Bingham & Shelley Company. It had worked with Muir in this manner on other structures under contracts entered into in the customary way. Other work on the building, such as painting and plumbing, was let by contracts made by Bingham & Shelley Company for Clossett.

Linklater, Muir's foreman, testified to the effect that some time before the accident he started to lay the permanent floor which was to be of 1x6, tongue and groove, which was then ready for use, but that Bingham said not to do so for the reason above stated; that he intended to cover the hole in the floor as soon as the trestles were taken down but had not had time to do so; and that he did not consider the opening dangerous.

REVERSED AND REMANDED.

For appellant there was a brief over the names of *Mr. Arthur I. Moulton, Mr. H. E. Hall* and *Mr. P. H. Murdock,* with an oral argument by *Mr. Moulton.*

For respondent, Bingham & Shelley Company, there was a brief over the names of *Messrs. Sheppard & Brock* and *Messrs. Stapleton & Sleight,* with an oral argument by *Mr. C. A. Sheppard.*

For respondent, Thomas Muir, there was a brief and an oral argument by *Mr. Coy Burnett.*

MR. JUSTICE BEAN delivered the opinion of the court.

There is but little controversy in regard to the facts which the evidence tended to show. Mr. Muir

was called as a witness by plaintiff and Mr. Bingham, president of the Bingham & Shelley Company, was a witness on behalf of that defendant. It appears that Mr. Clossett desiring to have Bingham & Shelley Company construct this building, a large one-story stable, and having confidence in the ability and fairness of that concern did not fix a contract price as it was uncertain how deep it would be necessary to excavate for a concrete basement, and also some old lumber belonging to him was to be used. He therefore arranged with this company to construct the building, he to pay the total cost and ten per cent additional for its services in superintending the construction and hiring and paying for the labor and materials, etc. There was no written contract for the work.

On account of the kind of lumber to be used Bingham & Shelley Company agreed that Mr. Muir should take care of the carpenter work for a flat price of $150, over and above the cost of the labor and materials. Linklater was foreman for Muir, and Cauldwell who had worked for the latter at different times as a carpenter was employed and paid by him to assist in that kind of work upon the building. About a week before the accident complained of Linklater proposed to lay a permanent floor on the ground floor joists which were then in place. Mr. Bingham, who represented the Bingham & Shelley Company, informed him that this was not desired then as there was no roof on the barn and he wished to go ahead with other work and it was desired to leave room for more light in the basement for a time. Bingham provided 2x12 planks for a temporary floor which he had laid to within about four feet of the west side wall next to which one plank was put leaving an opening 36x19 inches on the side between the floor timbers over which were placed bricklayers'

trestles four feet nine inches high extending out from the wall seven or eight feet. On these were planks and as the height of the wall progressed other trestles were put on top of the first tier of trestles. This side wall had been constructed at the time of the accident and a short time before the trestles had been removed under the direction of Bingham except near the end of the building. The apertures mentioned were not covered nor inclosed until after the accident. The decedent was at work with a colaborer on the temporary floor about eight feet from the opening and, in attempting to turn a large timber with the cant-hook which gave way, he stumbled backwards and fell through the aperture to the concrete floor below about nine or ten feet causing injuries from which he died soon afterwards.

4. It is contended on behalf of Bingham & Shelley Company that so far as this defendant is concerned there is no allegation in the complaint to bring the action within the Employers' Liability Act in that that pleading showed that the relation of employer and employee did not exist between Bingham & Shelley Company and Thomas J. Cauldwell. It is contended by defendant Thomas Muir that he was employed by the defendant company to superintend the carpenter work and that in pursuance thereto he placed Linklater as foreman and five or six other carpenters at work upon the building; that these men were paid by Bingham & Shelley Company though the money went through Muir, and all he was to receive was $150 for his services; that there was no relationship between Bingham & Shelley Company and Muir that constituted the latter an independent contractor; that under the authority of *Lawton* v. *Morgan, Fliedner & Boyce*, 66 Or. 292 (131 Pac. 314, 134 Pac. 1037), Muir cannot

be held liable under the act. The contention is made on behalf of plaintiff that the deceased Cauldwell was in the employ of the defendant Muir who, through his foreman Linklater, had complete control over the details of the work and that it was the duty of Muir to see that the Employers' Liability Act was complied with in relation to the floor upon which Cauldwell was directed by the foreman to work; that the defendant Bingham & Shelley Company was a contractor engaged in the erection of the building and violated the Employers' Liability Act in laying down the floor without enclosing the opening through which Cauldwell fell, in leaving an aperture there for approximately ten days, and in taking away the scaffolding without covering the hole, and that it is liable for injuries resulting therefrom.

The Employers' Liability Act (Laws 1911, pp. 16, et seq.), which has been quoted at length many times, so far as deemed necessary to note, provides that:

"All owners, contractors, subcontractors, corporations or persons whatsoever, engaged in the construction, repairing, alteration, removal or painting of any building, * * shall see that * * all shafts, wells, floor openings and similar places of danger shall be inclosed."

Section 3 is as follows:

"It shall be the duty of owners, contractors, subcontractors, foremen, architects, or other persons having charge of the particular work, to see that the requirements of this act are complied with, and for any failure in this respect" this section provides a penalty.

The evidence adduced upon the trial tended to show that each of these defendants were actively engaged in the construction of the building mentioned, and had immediate charge of and were responsible for the work

of laying the temporary floor in question. Bingham & Shelley Company, acting by Mr. Bingham, its president, was directly instrumental in supplying the lumber and placing the covering which was to serve as a platform upon which the mechanics were to work in erecting the stable. Having undertaken this particular work the statute specially enjoins upon this company the duty of conforming that part of the barn to the specifications of the law. It was its duty when from necessity or for convenience an opening in the temporary floor was left, to inclose the same in order to prevent those employed in and about the place from falling through the aperture whether they were the immediate employees of that company or not; *Morgan* v. *Bross,* 64 Or. 63 (129 Pac. 118.) The mandate of the Employers' Liability Act is plain and no one questions the power of the lawmakers to enact such provisions.

5. It cannot be held as a matter of law that a staging on the top of trestles about five feet above a floor opening would inclose the same within the meaning of the statute. The only evidence indicating that the position of Bingham & Shelley Company or Muir in the construction of this building was different from that of the usual building contractor was in the manner of their payment. How this could affect the mechanics employed in the building operations, who do not appear to have had any knowledge in regard to the matter, we are unable to discover. The true test of whether one is a mere servant or an employee is not the manner of receiving his compensation, but the question of whether the details of the work and the hiring and discharging of the employees who are to do the work is to be left to such person: *Lawton* v. *Morgan, Fliedner & Boyce,* 66 Or. 292 (131 Pac. 314, 134 Pac. 1037);

Harvey v. *Corbett,* 77 Or. 51 (150 Pac. 293); *Oregon Fisheries Co.* v. *Elmore Packing Co.,* 69 Or. 340 (138 Pac. 862). It is not essential that we determine whether Bingham & Shelley Company was acting in the capacity of a contractor or that of superintendent of construction as under such circumstances, as the evidence tended to disclose, the law enjoins upon either the duty of conforming to the statutory specifications and inclosing the opening. It may be that the company's duty partook of the nature of both of those designated callings. As to the defendant Muir the evidence tended to show that he had immediate charge of the carpenter work and was the employer of Cauldwell, deceased. It was his statutory duty to protect such opening in the floor of the room where he required his employee to perform his duties.

6. The enactment referred to is for the special protection of employees as well as to govern the liability of employers: *Lawton* v. *Morgan, Fliedner & Boyce,* 66 Or. 292, 300 (131 Pac. 314, 134 Pac. 1037). The evidence tends to bring both these defendants within the purview of the statute and to show that both were delinquent as alleged in the complaint. At least twice this court has affirmed judgments against architects, managers or foremen in similar cases where such superintendent had immediate charge of the particular work and failed to comply with the Employers' Liability Act: *Hoag* v. *Wash.-Ore. Corporation,* 75 Or. 588, 604 (144 Pac. 574, 147 Pac. 756); *Harvey* v. *Corbett,* 77 Or. 51, 61 and 62 (150 Pac. 263). The violation of a statute designed for the protection of others constitutes conclusive evidence of negligence or negligence *per se:* 1 Thomp. Neg., §§ 10 and 11; *Peterson* v. *Standard Oil Co.,* 55 Or. 511, 520 (106 Pac. 337, Ann. Cas. 1912A, 625); *Siemers* v. *Eisen,* 54 Cal. 418; *Os-*

borne v. *McMasters,* 40 Minn. 103 (41 N. W. 543, 12 Am. St. Rep. 698).

7. We are not called upon to say whether Clossett was delinquent or not. Suffice it to say that Section 2 of the act declares that the superintendent or person in charge or control of the particular work shall be held to be the agent of the employer in cases for damages. It does not relieve such superintendent from personal liability for neglect of duty enjoined by Section 3 and other parts of the law.

8. It is claimed by defendant Muir that as his foreman desired to lay the permanent floor prior to the injury this absolved him from liability on account of a defect in the temporary one. It does not necessarily follow that because one erecting a building does not desire to have the permanent floor constructed when there is no roof on the structure that a license is given any one to neglect to fulfill the requirements of the law in arranging the temporary covering. The statute decrees that all shafts, wells, floor openings and other similar places of danger where workmen are engaged in the construction of a building shall be inclosed. This refers to an opening in a temporary floor as well as in a permanent one. It does not appear that either the Bingham & Shelley Company or Muir lacked authority or were prevented by any one of higher authority from guarding the aperture in question. As the evidence tends to show they simply neglected to do so and in this were delinquent. Whether these facts narrated were true or not was a question for the consideration of the jury. We are of opinion that the cause should have been submitted to that body and that the lower court erred in granting the motion for a directed verdict in favor of defendants.

9. Plaintiff called as a witness A. L. Lolspeich who identified an application for a permit to construct the building in question made by Bingham in which he designated his company under its former name as the builder and Mr. Joseph Clossett as the owner. Upon objection by defendants' counsel the document was excluded as incompetent, plaintiff's counsel saving an exception. The application was a written declaration regarding the connection of Bingham & Shelly Company with the construction of the building in question and we think for that purpose was competent. We do not deem it necessary to consider other assigned errors as we have observed none which would be likely to recur. It follows that the judgment of the lower court will be reversed and the cause remanded for a new trial. REVERSED AND REMANDED.

MR. CHIEF JUSTICE MCBRIDE, MR. JUSTICE MOORE and MR. JUSTICE MCCAMANT concur.

Argued February 20, modified and affirmed March 20, rehearing denied May 1, second petition for rehearing denied May 22, 1917.

SMITH *v.* WILLIS.

(163 Pac. 810.)

Mortgages—Foreclosure—Equitable Defense.

1. In a mortgage foreclosure action, defendant's claim that plaintiff's failure to furnish water for irrigating the land pursuant to a contract made as part of the mortgage transaction is available as an equitable defense, although not strictly a counterclaim.

Mortgages—Foreclosure—Defense—Sufficiency of Pleading.

2. In a mortgage foreclosure action, defendant's allegations that its agricultural crops were injured by plaintiff's failure to furnish water for irrigation pursuant to contract *held* sufficient, in absence of motion to make more definite.

Waters and Watercourses—Irrigation—Contract for Water.

3. Under a contract to furnish certain amounts of water for irrigation, and allowing the land owner to designate when it should be delivered upon giving three days' written notice, failure to furnish the prescribed amount of water is not excused because no notice was given, since such notice is only necessary where the land owner desires to regulate the flow.

Mortgages—Foreclosure—Deficiency—Judgment.

4. Where the demurrer to an answer in a mortgage foreclosure action was sustained, the court could not decree there should be no deficiency judgment, since there was no pleading upon which it could find the mortgage was given for the purchase price.

Waters and Watercourses—Irrigation—Agreement to Furnish Water—Effect.

5. Where an agreement to perpetually furnish water for irrigation was executed as a conveyance, the water right conveyed became appurtenant to and a part of the land.

Mortgages—Foreclosure—Deficiency—Judgment.

6. Where a deed, the vendor's agreement to furnish water for irrigation, and a mortgage securing payment for the land and water rights constituted one transaction, no deficiency judgment can be rendered upon foreclosing the mortgage, since it was a purchase-money mortgage.

[As to rights and remedies of mortgagor at common law, see note in 7 **Am. St. Rep.** 31.]

From Malheur: DALTON BIGGS, Judge.

A foreclosure suit by Douglas Smith, Albert G. Lester and William Butterworth, trustees, against S. M. Willis and L. G. Willis. Plaintiffs being dissatisfied with the decree rendered in the lower court, prosecutes this appeal. Affirmed as modified.

Department 1. Statement by MR. CHIEF JUSTICE MCBRIDE.

This is a suit to foreclose two mortgages upon separate parcels of land, hereinafter called for convenience tracts No. 1 and No. 2. The defendant answered setting up separate defenses as to each cause of suit, and a demurrer having been sustained to the answer default was made as to tract No. 1. An amended answer as to tract No. 2 was filed, which admitted the execu-

tion of the note and mortgage sued upon and set up as an affirmative defense by way of equitable recoupment substantially the following facts: That plaintiffs' predecessor in interest, the Willow River Land and Irrigation Company, before the date of the mortgage, was the owner of the land sought to be purchased, as well as of a large body of similar land adjacent thereto, all of which was naturally arid, unproductive, and unfit for cultivation; that for the purpose of reclaiming said land, including that of plaintiffs, the plaintiffs' predecessor constructed an expensive irrigation system, consisting of dams, reservoirs, canals, and ditches, whereby the waters of Willow River and the other streams were impounded and so held and controlled as to be capable of furnishing water ample for the complete and sufficient irrigation of the land described in the complaint as tract No. 2, by the use of which said tract could be made very valuable and productive; that the said Willow River Company being so the owner of the water system described, and being able to furnish the amount of water hereinafter specified, sold and conveyed to S. M. Willis, the perpetual right to one-half inch of water per acre miner's measurement under six-inch pressure of the water so controlled by it, to be used upon and for the irrigation of tract No. 2, and also sold to said defendant said tract for the sum of $4,000; that at the time of the purchase the defendant S. M. Willis paid to the Willow River Company $1,000 cash and executed the note described in the complaint and a mortgage upon tract No. 2 and upon the aforesaid water right to secure the payment of the note; that the conveyance of the water right was dated February 8, 1909, being signed by the parties February 10, 1909, and the deed to tract No. 2 was executed February 28, 1909, but

that the payment of the $1,000 and the execution of said note and mortgage were all made in contemplation of said deed, and were all parts of the same transaction; that by reason of the arid nature of the tract the defendant S. M. Willis would not have purchased it without the water right, which becoming appurtenant thereto and being used for irrigation thereon rendered the same very productive; that by such use the said land became especially valuable for the cultivation and propagation of fruit trees, and particularly for apples, peaches, and pears, and it also thereby became valuable for the raising of the ordinary agricultural crops; that she purchased the land and water right, paid the $1,000, and executed the note and mortgage for the express purpose of planting an orchard thereon, consisting especially of apples, peaches, and pears, and would not have purchased them for any other purpose, have paid the $1,000, nor have executed said note or mortgage; that said Willow River Land and Irrigation Company, well knowing said defendant was making the purchase for such purpose and that she would not have otherwise entered into such negotiations, urged and encouraged both herself and her husband, her codefendant herein, to make said purchase for said purposes, and as an inducement represented that by the use of the water so conveyed and guaranteed to her there could be grown and matured upon said land first-class fruit trees, especially apples, peaches, and pears, producing excellent fruit in great quantities, and that large profits could be made thereby; that neither the Willow River Land and Irrigation Company nor plaintiffs have furnished the amount of water stipulated in the agreement, but on the contrary have failed, neglected, and refused to do so at all times

since July 1, 1910; that the quantity actually furnished is as follows:

"For the year 1910, one and one-half acre-feet, three fourths of which was furnished before July first; for the year 1911, one and one-half acre-feet; for the year 1912, one-half acre-foot; for the year 1913, one acre-foot; and for the year 1914, two acre-feet."

That reduced to acre-feet the quantity of water agreed to be furnished by plaintiffs amounts to four and two-tenths acre-feet for each acre of said land; that said quantity of water so furnished was entirely insufficient for the irrigation thereof. It is further alleged that plaintiffs and their predecessor had the water and could have furnished it. The answer then sets forth that defendants, relying upon the agreement of plaintiff and its predecessor to furnish water, in 1909 set out five acres of land in peach trees, five acres in pear trees, and twenty-eight acres in apple trees, all being of the best quality, and tended and cultivated them carefully and in a manner calculated to produce the best results, but by reason of the failure and refusal of the plaintiffs and their predecessor to furnish water as agreed, the land and water right have been worth more than $4,500 less during said period than they would have been if the water had been furnished as agreed; that the Willow River Company and these plaintiffs, as its successors, are the owners of a large quantity of arid land below the land of defendants, and have planted about 800 acres to fruit trees and agricultural crops, and are using water from the irrigation system to irrigate this tract, and in order to do so arbitrarily refuse to furnish defendants with the water stipulated in the contract; that by reason of the failure of plaintiffs and their predecessor to furnish water as agreed, the fruit, the fruit trees, and agricultural crops

planted and growing on said land were damaged to the full amount of $4,500; that plaintiffs are nonresidents of this state, residing in the State of Illinois. Attached to the answer is a copy of the water agreement, too long to be inserted here. We give such portions of it as are material to this discussion:

"Whereas, said party of the second part is the owner of or has contracted for the following described real estate, being in its nature arid land, to-wit: The northwest quarter of the northeast quarter of section 23, township 15 south, range 42 east, Willamette Meridian, except a strip of land sixteen and one-half feet wide around the outside boundary thereof for road purposes; and, whereas, said party of the second part is desirous of acquiring water for the purposes of irrigating said land, said water when acquired to be used and enjoyed in connection with said land only; now, therefore, in consideration of the premises and in consideration of the sum of $1 to it in hand paid, and in consideration of the full compliance by said party of the second part with each and all covenants and conditions herein made incumbent on said second party, said party of the first part doth now and here agree and bind itself, its successors and assigns, subject to the conditions and reservations herein expressed, to furnish to said party of the second part during the irrigation season of each year a sufficient quantity of water to properly irrigate said land so owned by said party of the second part, to-wit: One half miner's inch of water under a six inch pressure or head for each and every acre of land so owned by said party of the second part and as hereinabove described. Said water shall be delivered by said party of the first part to the said party of the second part through the irrigation season of each year; it being understood that the irrigation season shall begin on or about the first of April of each year, and continue until about the fifteenth of September of each year. Said party of the second part during said season as herein defined shall have the right to designate

the time or times when said water shall be delivered to said party of the second part, on giving a three days' notice in writing thereof to said first party, and it being further understood that the total amount of water so to be delivered to said second party shall not in any event exceed the amount of one half miner's inches under six-inch pressure for each acre of land so owned by said party and as hereinabove described."

A demurrer being overruled the cause was put in issue by a reply, and upon the trial the court found that there had been no injury to defendants by reason of failure of plaintiffs to furnish water for the purpose of irrigating the fruit trees, but that their agricultural crops had been damaged in the sum of $1,996.75, and deducted that sum from the amount of plaintiff's recovery. The court also directed the tracts to be sold separately, and that no deficiency judgment should be entered against defendants. From this decree plaintiffs appeal.

MODIFIED AND AFFIRMED.

For appellants there was a brief with oral arguments by *Mr. Robert M. Duncan* and *Mr. Thomas G. Greene.*

For respondents there was a brief over the names of *Mr. Lionel R. Webster* and *Mr. George E. Davis,* with an oral argument by *Mr. Webster.*

Opinion by MR. CHIEF JUSTICE MCBRIDE.

1. It is first objected that the demand of defendants here being unliquidated and not arising out of the same transaction as that which occasioned the execution of the mortgage cannot be set off against plaintiff's claim; and to that effect the able counsel for plaintiffs cite Section 74, L. O. L., as amended by Laws

of 1913, p. 312; *Burrage* v. *Bonanza Gold & Quicksilver Mining Co.*, 12 Or. 169 (6 Pac. 766); *Le Clare* v. *Thebault*, 41 Or. 601 (69 Pac. 552). The relation of these cases to the one at bar will be considered later. It may be said that the defense here urged is not strictly a counterclaim, and is not so pleaded. A counterclaim is purely a creature of the statute. It did not exist at common law, which left parties having reciprocal causes of action to litigate them separately; but there has grown up in the courts of this country a practice in equity independent of statutes allowing a defendant to recoup or set off reciprocal demands against the plaintiff where a denial of such privilege would work such hardship as to amount to a substantial denial of justice. Among the principal reasons for the application of this doctrine the nonresidence of the plaintiff in the state where the action or suit is brought and insolvency are mentioned: *Ewing-Merkle Electric Co.* v. *Lewisville Light & Water Co.*, 92 Ark. 594 (124 S. W. 509, 19 Ann. Cas. 1041, 30 L. R. A. (N. S.) 21). This was a case in which an action was brought to recover a balance for goods sold and delivered to defendant, to which defendant filed a cross-bill alleging damages for breach of warranty by the plaintiff in another transaction, stating that plaintiff was a nonresident of Arkansas and had no agent in the state upon whom service of summons could be made, and asking that the cause be heard in chancery. The case is not different in principle from the case at bar. The court allowed the offset and gave judgment for the defendant for a balance found due it, and in the course of its opinion said:

"The evidence was sufficient to sustain the findings of fact by the court. At law appellee was not entitled to set up in this action by way of set-off or counter-

claim, the $1,050 damages suffered by it by a breach of contract made by appellant. Was it entitled to set it up as an equitable set-off? In 2 Story's Equity Jurisprudence, 13th ed., § 1437a, it is said: 'It has been already suggested that courts of equity will extend the doctrine of set-off and claims in the nature of set-off beyond the law in all cases where peculiar equities intervene between the parties. These are so very various as to admit of no comprehensive enumeration.' In *North Chicago Rolling Mill Co.* v. *St. Louis Ore & Steel Co.*, 152 U. S. 596, 616, 38 L. Ed. 565, 572, 14 Sup. Ct. Rep. 710, 716, it is said: 'By the decided weight of authority it is settled that the insolvency of the party against whom the set-off is claimed is a sufficient ground for equitable interference. * * In addition to insolvency it is held by many well-considered decisions, including those of Illinois, that the nonresidence of the party against whom the set-off is asserted is good ground for equitable relief. *Quick* v. *Lemon*, 105 Ill. 578; *Taylor* v. *Stowell*, 4 Metc. (Ky.) 175; *Forbes* v. *Cooper*, 88 Ky. 285 (11 S. W. 24); *Robbins* v. *Holley*, 1 T. B. Mon. (Ky.) 191; *Edminson* v. *Baxter*, 4 Hayw. (Tenn.) 112 (9 Am. Dec. 751); *Davis* v. *Milburn*, 3 Iowa, 163.' In *Forbes* v. *Cooper*, *supra*, it is said: 'It is certainly unconscientious for an insolvent party to coerce the payment of his claim when he is owing the other party an equal or larger sum, and thus leave the latter remediless, nor should a nonresident be allowed, under like circumstances, to enforce through the agency of the courts the collection of his debt, and compel the other party to seek a foreign jurisdiction for relief, and then perhaps find the debtor insolvent. If the object of litigation be the attainment of justice, assuredly such results should be prevented. Indeed, the doctrine of equitable set-off to the extent it was formerly applied was based upon moral justice, and to meet such cases as the above, thus preventing wrong. It was then not uncommon to stay an insolvent or nonresident debtor in the collection of his claim until damages to which the complainant might be entitled against him

were liquidated under the order of the chancellor, and then apply them in satisfaction of his independent debt.' In *Quick* v. *Lemon*, *supra*, it is said: 'It would seem to be inequitable to require the corporation to go to another state to collect its demand in an action at law, and we are inclined to hold that the nonresidence of the complainant, in connection with the fact that he calls upon a court of equity to enforce his judgment, is sufficient to allow the defendant corporation to prove and set off its demand set up in the cross-bill against the judgment of the complainant.' To the same effect see *Porter* v. *Roseman*, 165 Ind. 255, 112 Am. St. Rep. 222, 74 N. E. 1105, 6 Ann. Cas. 718, and note to that case and cases cited. The rule announced in these cases is a just rule, and should be enforced. We see no good reason for sending a citizen of this state to a foreign jurisdiction to obtain justice when the courts of this state can afford relief. They are as fully competent to afford relief to the citizen as to the nonresident. Why should one in cases like this be accorded greater rights than the other?''

Among the cases cited in the note to the above case are the following, where the claims offset were for unliquidated damages: *Plattner Implement Co.* v. *Bradley A. & Co.*, 40 Colo. 95 (90 Pac. 86); *Fitzgerald* v. *Wiley*, 22 App. D. C. 329; *Taylor* v. *Stowell*, 4 Met. (Ky.) 175; *Forbes* v. *Cooper*, 88 Ky. 285 (11 S. W. 24); *Edminson* v. *Baxter*, 4 Hayw. (Tenn.) 112 (9 Am. Dec. 751); *North Chicago Rolling Mill Co.* v. *St. Louis Ore & Steel Co.*, 152 U. S. 596 (38 L. Ed. 565, 14 Sup. Ct. Rep. 710). The authorities both for and against the proposition are so exceedingly well collated in the note in 30 L. R. A. 21, that it is needless to recapitulate them here. We have carefully examined them, as well as other cases cited by counsel, and agree with the doctrine announced by the Supreme Court of Arkansas in the case first cited. The plain-

tiffs in this case come into a court of equity and say to the defendants:

"You owe us $3,000 upon a note and mortgage, and we demand payment or foreclosure."

The defendants reply:

"Yes, it is true that we gave you a note and mortgage and agreed to pay you $3,000, but that promise was in consideration, among other things, that you would furnish us water to irrigate our orchard and crops. You did not furnish the water, and by reason of your breach of the contract the land that we mortgaged to you failed to produce the crops which a compliance by you with your agreement would have enabled us to produce, and by your failure to keep your agreement we are injured in a sum greater than the amount of your mortgage."

The plaintiffs then say to the court:

"Please allow us to use the equitable machinery of this court to sell these people out of house and home, and after we have done that they can come to Chicago and bring an action at law to determine whether we have broken our agreement to furnish them water."

This is not one whit overdrawn. It is plaintiffs' contention stripped of legal verbiage and expressed in common, every-day language; and the very statement of it marks its inequity. The defendants' answer was good as an equitable defense.

2. The next question suggested in the brief of appellant is that there was no allegation in the answer upon which the court could base a finding of damage to defendants' agricultural crops. While the allegations in regard to damage to agricultural crops are somewhat meager when compared with the reiteration of the claim for damages respecting the orchard, we

think in the absence of a motion to make more definite and certain they were sufficient. They are these:

"That by the use of said water on said land in the irrigation thereof under and pursuant to said perpetual right of use as aforesaid, said land became especially valuable for the cultivation and propagation of fruit trees and particularly for apples, peaches, and pears, *and said land also thereby became valuable for the raising of the ordinary agricultural crops.*"

This taken in connection with the other allegations regarding the worthlessness of the land without water fairly states that water was necessary in order to raise agricultural crops. Again we find this allegation:

"And by reason of said faults, failures, and refusals [referring to plaintiffs' failure to furnish water], said S. M. Willis has suffered the loss of, and to, her fruit trees and fruit, *and agricultural crops planted and growing* on said land to the full amount of $4,500."

Both these allegations are denied in the reply. We think they put in issue three matters: (1) Whether the water was necessary for the growing of agricultural crops; (2) whether such crops were planted and grown upon said land; and (3) whether they were injured by reason of plaintiffs' refusal to furnish the necessary water to irrigate them as provided in the agreement. It is true that the allegations in the answer are not models of good pleading, but they were sufficient to raise the issue, and the testimony on this branch of the case was not objected to on the ground of the insufficiency of the pleading. We think such damages were general and such as might reasonably be expected as the result of the injury averred: 1 Sutherland on Damages, 763 et seq.; 8 R. C. L., § 156, p. 611; *Wisner* v. *Barber,* 10 Or. 342; *Dose* v. *Tooze,* 37 Or. 13 (60 Pac. 380). It is the view of the writer

that the pleading would be sufficient even if tested by the rule applied to allegations of special damage; there being no specific objection to it by motion: 13 Cyc. 179; *Knittel* v. *Schmidt,* 16 Tex. Civ. App. 7 (40 S. W. 507); *Conover* v. *Hanke,* 71 Wis. 108 (36 N. W. 616). The wrong alleged is a breach of a contract to furnish water. The damage therefrom is alleged to be the injury to fruit and agricultural crops planted and growing upon the land. The defendants were not asked and neither did the law require them to itemize their damages nor to present them in the form of a bill of particulars.

3. It is further contended that under the irrigation agreement between plaintiffs' predecessor and the defendants the plaintiffs could not be put in default for failure to furnish water unless the defendants should have demanded the delivery thereof by a three days' notice in writing. We do not so construe the contract. It is evident that it was the intention first to provide for a continuous flow of water in quantity of one half a miner's inch for every acre of land in tract No. 2 during the irrigation season, namely, from April 1st to September 15th of each year. The succeeding clause giving the purchaser a right to vary the method of delivery by giving three days' notice in writing was for the benefit of the purchaser, who might thereby instead of having a small quantity delivered continuously amass water, so to speak, and have the quantity so conserved delivered to him according to his needs so long as the quantity ultimately demanded should not exceed 4½ acre-feet during the season, which would be the total flow computed in acre-feet. There was reason in requiring notice to be given in writing when a delivery of water was to be required in larger quantities and at intervals instead

of continuously, since it would enable the grantor to make arrangement to conserve in its reservoirs a sufficient quantity of water to meet the demand. The evidence indicates that defendants frequently verbally demanded the water to which they were entitled, and that it was not furnished. It also sufficiently appears that the original grantor and these plaintiffs used water from their irrigation system to irrigate 800 acres of their own land, and that this occasioned such a shortage they were unable to furnish the water in the agreed quantity to defendants. This they had no right to do. It was their duty to furnish the water they had contracted to furnish to defendants at any inconvenience that a compliance with their contract might occasion to themselves, and they had no legal right to occasion a shortage by creating an additional use on lands owned by them.

4–6. The court erred by decreeing that there should be no deficiency judgment relative to tract No. 1. As to this tract there was no defense. The demurrer to the answer having been sustained, and no new pleading having been filed, the case stood as though no answer had ever been attempted, and there was no pleading upon which the court could base a decree that the note and mortgage given on that tract were executed to secure the purchase price. Upon tract No. 2 the case is different. The agreement to furnish the water, the deed conveying the land, and the mortgage were all parts of the same transaction, and it is specified in the contract, which is executed with all the formalities attending a conveyance of real property, that the right therein conveyed shall be perpetual. The water right thereby became an appurtenance to the land, and as such a part of the realty: *Ruhnke* v. *Aubert,* 58 Or. 6 (113 Pac. 38).

Treating the deed, the water contract, and the mortgage as one instrument, as they should be considered under the circumstances, the conclusion follows that the mortgage was for the purchase price of real property, and the plaintiffs were not entitled to a deficiency judgment as to the mortgage upon tract No. 2. With the modification above suggested the decree will be affirmed, and defendants will recover their costs.

MODIFIED AND AFFIRMED.

MR. JUSTICE BENSON, MR. JUSTICE BURNETT and MR. JUSTICE HARRIS concur.

Argued April 26, reversed and remanded May 15, 1917.

WALLER v. CITY OF NEW YORK INS. CO.*

(164 Pac. 959.)

Insurance—Construction of Fire Policy—Absolute Ownership.

1. A party in possession under a partly performed contract for the purchase of realty is the sole and unconditional owner in fee simple within the Oregon standard fire insurance policy.

Appeal and Error—Harmless Error—Instructions.

2. Where the court should have instructed that plaintiff insured was the owner of property burned, defendant insurance company cannot complain because the question was left to the jury.

[As to burden of proof as to sole and unconditional ownership in action on fire insurance policy, see note in Ann. Cas. 1913B, 212.]

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*For authorities discussing the question whether or not a vendor under a land contract can be held to be a "sole and unconditional owner" for the purposes of insurance, see notes in 22 L. R. A. 527; 27 L. R. A. 614; 40 L. R. A. 358; 59 L. R. A. 319; 66 L. R. A. 569.

On how far an undivided interest in property is a complete and full ownership for the purposes of insurance, see notes in 18 L. R. A. 481; 21 L. R. A. (N. S.) 442.

On right of vendee to insurance under executory contract as owner where vendor holds legal title, see note in 20 L. R. A. (N. S.) 775.

The question of outstanding contract for sale of property as defeating sole and unconditional ownership by vendor is discussed in notes in 2 L. R. A. (N. S.) 512; 52 L. R. A. (N. S.) 670. REPORTER.

Insurance—Pleading—Reply—Waiver.

3. An insured cannot declare upon the policy and, when charged by the insurer's answer with shortcomings, reply that such omissions were waived.

Pleading—Reply—Departure.

4. A plaintiff cannot allege that he has fully complied with a contract, and later shift his ground by replying that the omissions charged in defendant's answer were waived.

Appeal and Error—Review—Instructions.

5. Although defendant insurance company's allegations regarding plaintiff's misrepresentations were insufficient, yet instructing that such defense might be waived constitutes reversible error where waiver was not an issue.

Insurance—Fraudulent Representations—Pleading.

6. A fraudulent misrepresentation avoiding a fire insurance policy must have been knowingly false, have misled the insurer, and increased the risk.

Insurance—Fraudulent Representations—Pleading.

7. Defendant fire insurance company's allegations that plaintiff secured insurance on a house which defendant had previously refused to insure by misstating its name and location, *held* insufficient where facts showing the materiality of such representations or the resulting damage to defendant were not stated.

From Multnomah: T. E. J. DUFFY, Judge.

Action by Frank L. Waller against the City of New York Insurance Company, a corporation, to recover for loss by fire of a building occupied as a dwelling, that was insured in the defendant company. From the verdict of a jury in favor of plaintiff, defendant appeals. Reversed and remanded.

Department 1. Statement by MR. JUSTICE BURNETT.

This is an action by the assured to recover on a policy of insurance in the standard statutory form for loss by fire of property described as a one and one-half story frame building and its additions occupied as a dwelling, and situate on the realty mentioned therein. The complaint alleges the corporate character of the defendant and the making of the contract

of insurance upon the consideration of a premium of $12, setting out as an exhibit a copy of the policy. It also avers that the plaintiff was the sole owner of the property; that it was destroyed by fire August 22, 1914, without any fault of his while the policy was in force; that thereafter he gave notice of the loss and made proof of the same; that the value of the property was greatly in excess of the amount of the insurance and that although he has fully and substantially performed the contract on his part to be performed the defendant has refused to pay the loss notwithstanding his demand therefor.

The answer admits the execution of the policy "purporting to be on a dwelling-house" and the presentation of proofs of loss, but otherwise denies the allegations of the complaint. Besides stating in each the corporate character of the defendant as an insurance company, it sets up three separate defenses as follows:

1. "That on or about the 18th day of August, 1914, this plaintiff did by false and fraudulent means and misrepresentations induce this defendant to issue and deliver the insurance policy mentioned in plaintiff's amended complaint; that prior to the time said policy was issued, this plaintiff called upon the agents and representatives of this defendant in the city of Portland, Oregon, and at said time requested a policy of insurance upon a building, commonly known as 'The Hut'; that the defendant and its agents refused to issue any policy upon said building; that said building at said time was used for road house purposes; that prior to the time said policy was issued this plaintiff wrongfully, intentionally and fraudulently represented that the property upon which said policy was to be placed was not the road house, commonly known as 'The Hut' but was a building situated back of Willamette Heights in the city of Portland, County of Multnomah, Oregon. That the plaintiff knew that said

representations were false and fraudulent and were made intentionally, and said representations were acted upon to the damage and injury of this defendant. That said policy of insurance was secured through fraudulent and false means by this plaintiff. * *

2. "That on or about the 18th day of August, 1914, this defendant, because of the fraud and misrepresentations of this plaintiff, made, executed and delivered to the plaintiff the policy of insurance mentioned in plaintiff's amended complaint. That said insurance policy provides that the plaintiff and holder of said policy should be the owner in fee simple of the premises sought to be insured. That at the time of the execution of said policy and at the time of the fire complained of by the plaintiff, this plaintiff was not the owner in fee simple of said property, and at no time mentioned in said amended complaint was the plaintiff the owner in fee simple of the property described in said complaint, and in the policy of insurance set forth in said complaint, and the plaintiff at the time of the issuance of the policy set forth in his complaint fraudulently misrepresented his title to the property insured, all to the damage of this defendant. * *

3. "That at the time of the issuance of insurance policy set forth in plaintiff's amended complaint said property was not used as a dwelling house and has never been used as a dwelling house. That said property is commonly known as 'The Hut' and used for road house purposes. That said building was not occupied at the time of the issuance of said policy, nor at any time mentioned in said complaint."

The reply traverses each of these defenses and asserts the following:

"That after said fire occurred and after said defendant was informed of all of the alleged matters set forth in said first, second and third separate answers and alleged defenses, the said defendant demanded of and received from the plaintiff the full premium on said policy of insurance, and furthermore requested and demanded that the plaintiff submit himself for examin-

ation under and by virtue of the terms of said policy, and the said plaintiff in conformance with said request did submit himself for examination, and was examined relative to the matters contained in said policy of insurance by the defendant and its agents; that the defendant has otherwise requested of and from the plaintiff additional information; that because and by reason thereof, the said defendant has waived any right that it might otherwise have had to urge said defenses, and has by reason of its actions, as aforesaid, affirmed and ratified said contract of insurance."

A jury trial resulted in a judgment for the plaintiff from which the defendant appeals.

REVERSED AND REMANDED.

For appellant there was a brief over the name of *Messrs. Senn, Ekwall & Recken,* with an oral argument by *Mr. Frank S. Senn.*

For respondent there was a brief over the name of *Messrs. Seitz & Clark,* with an oral argument by *Mr. Maurice W. Seitz.*

MR. JUSTICE BURNETT delivered the opinion of the court.

One of the questions urged on appeal is whether the plaintiff was the sole and unconditional owner of the property within the meaning of the policy and held the fee-simple estate in the ground on which the burned house was situated. From the documentary evidence on file it appears that the North Portland Investment Company contracted with the plaintiff's predecessor in interest to sell to him and the latter agreed to buy the realty on which stood the destroyed building, upon his payment of certain sums of money which he agreed to pay, and that in pursuance thereof the plaintiff was in possession of the property at the time of the insur-

ance and of the fire. It is also without dispute in the testimony that the plaintiff was not in default in his payments up to the time of the trial although the purchase price had not been fully paid.

The contract was for the sale of the fee in the land and not for any less estate such as one for life or for years. Under such circumstances, the grantor or one who contracts to sell the property becomes the trustee of the legal title for the benefit of the grantee while the latter enjoys the real beneficial interest in the property, and upon him would fall the loss in case of destruction of its tenements. The object of insurance is to reimburse the beneficial owner upon whom the loss would fall if the structure thereon were burned. Keeping in view the purpose of the transaction, his estate within the meaning of the standard form of policy is to be considered as to its quality and not merely by his muniments of title. In other words, we are not called upon in this proceeding to examine an abstract of title nor to adjudicate the ownership of the realty in an ejectment action. We are to ascertain upon whom the loss fell in the burning of the insured property and if the plaintiff is the only one in that category he fulfills the terms of the policy on that point. Of course, the vendor in a title bond may have an insurable interest in the subject of the contract, but it must be described in the policy in apt terms other than those of the standard form used in this instance.

It likewise appears in this case that, as an incident to the transaction, a deed from the original owner to the plaintiff's immediate grantor had been prepared and left as an escrow with a depositary to be delivered when the purchase price was fully paid. It is contended by the defendant, and rightly, too, that an escrow does not of itself operate to pass title until it

has been regularly delivered as stipulated. That, however, is not by the mark in the present case. Whatever estate the plaintiff had, passed by operation of the contract to sell the realty in question.

The doctrine about ownership is thus laid down by Judge SANBORN in *Phenix Ins. Co.* v. *Kerr,* 129 Fed. 723 (66 L. R. A. 569, 572, 64 C. C. A. 251):

"The object of the provision in policies of insurance that they shall be void if the interests of the assured in the property is not the sole and unconditional ownership of it is to prevent gambling contracts, and to protect the companies against the claims of those who have no insurable interest in the property injured or destroyed. The purchaser of the property, who is in the possession of it under a contract whereby the former owner agrees to sell and the buyer absolutely binds himself to purchase and to pay an agreed price for the property, is almost universally held to be the unconditional owner of it under the clause under consideration, because the loss from any injury or destruction of the property falls upon him. If the owner has agreed to sell and the vendee has agreed to buy on definite terms, the purchaser is the sole and unconditional owner of the property within the true meaning of the clause upon this subject in insurance policies, because the vendor can compel the purchaser to pay for the property notwithstanding its injury or destruction, and hence to suffer the loss occasioned thereby"—citing numerous authorities.

In the same case the learned judge distinguishes this doctrine from the rule applicable where a would-be purchaser has a mere option, which he may exercise or decline to purchase the land, and points out that in the latter instance he is not the owner of the property within the purview of the clause under discussion.

Again in *Loventhal* v. *Home Ins. Co.,* 112 Ala. 110, (20 South. 419, 57 Am. St. Rep. 17, 33 L. R. A. 258), the court said:

"The term 'fee simple' has never been used to distinguish between legal and equitable estates. It is used to denote the quantity or duration of estates, whether the enjoyment is limited or unlimited in point of continuance or duration. It defines the largest estate in land known to the law. It is an estate of inheritance, unlimited in duration, descendible to all the heirs alike of the owner to the remotest generations. It may be of a legal or equitable nature. If of the latter, the legal holder is a mere trustee for the equitable, who is the real owner, and, restrained by no provision of the trust, in cases not within the statute of uses, may at any time be compelled to execute the legal estate in him."

In *Baker* v. *State Ins. Co.,* 31 Or. 41 (48 Pac. 699, 65 Am. St. Rep. 807), Mr. Justice WOLVERTON reviews the authorities and arrives at the conclusion embodied in the syllabus, that:

"A warranty that the insured is the sole and undisputed owner of the insured property and that the title to the land is in her name, is not broken by the fact that legal title has not been conveyed to the insured, where she has gone into possession under a contract of purchase and has performed on her part all the conditions thereof to the date of application as the term 'title' is to be construed in the ordinary acceptation of the term."

The cases are practically unanimous in holding that where the insured is in possession under a partly performed contract for the purchase of the land in which the grantor covenants to sell and the grantee agrees to buy, the latter, within the terms of the standard insurance policy is the sole and unconditional owner in fee simple of the realty. On the other hand, the grantor in such cases does not come within the descriptive words of the contract of insurance. The following precedents verify this doctrine: *McCoy* v. *Iowa State Ins. Co.,* 107 Iowa, 80 (77 N. W. 529); *Milwaukee Me-*

chanics' Ins. Co. v. *B. S. Rhea & Son,* 123 Fed. 9 (60 C. C. A. 103); *Ramsey* v. *Phenix Ins. Co.,* 2 Fed. 429; *Insurance Co. of North America* v. *Erickson,* 50 Fla. 419 (111 Am. St. Rep. 121, 7 Ann. Cas. 495, 2 L. R. A. (N. S.) 512, 39 South. 495); *Clay etc. Ins. Co.* v. *Huron etc. Mfg. Co.,* 31 Mich. 346; *Rosenstock* v. *Mississippi Home Ins. Co.,* 82 Miss. 674 (35 South. 309); *Davis* v. *Pioneer Furniture Co.,* 102 Wis. 394 (78 N. W. 596); *Matthews* v. *Capital Fire Ins. Co.,* 115 Wis. 272 (91 N. W. 675); *Allen* v. *Phenix Assur Co.,* 12 Idaho, 653 (88 Pac. 245, 10 Ann. Cas. 328, 8 L. R. A. (N. S.) 903); *Arkansas Ins. Co.* v. *McManus,* 86 Ark. 115 (110 S. W. 797); *Arkansas Ins. Co.* v. *Cox,* 21 Okl. 873 (98 Pac. 552, 129 Am. St. Rep. 808, 20 L. R. A. (N. S.) 775; *McCollough* v. *Home Ins. Co.,* 155 Cal. 659 (102 Pac. 814, 18 Ann. Cas. 862); *Modlin* v. *Atlantic Fire Ins. Co.,* 151 N. C. 35 (65 S. E. 206); *Phenix Ins. Co.* v. *Hilliard,* 59 Fla. 590 (52 South. 799, 138 Am. St. Rep. 171); *Connecticut Fire Ins. Co.* v. *Colorado Leasing etc. Co.,* 50 Colo. 424 (116 Pac. 154, Ann. Cas. 1912C, 597); *Hankins* v. *Williamsburg City Fire Ins. Co.,* 96 Kan. 706 (153 Pac. 491).

With the documentary evidence before it, the court should have instructed the jury as to its legal effect and declared that the plaintiff was the sole and unconditional owner in fee of the land upon which the building stood within the meaning of the policy: Section 136, L. O. L. In support of its contention that the plaintiff was not the sole and unconditional owner in fee simple the defendant cites *Finlon* v. *National Union Fire Ins. Co.,* 65 Or. 493 (132 Pac. 712); *Oatman* v. *Bankers' Fire Relief Association,* 66 Or. 388 (133 Pac. 1183, 134 Pac. 1033); and *Howard* v. *Horticultural Fire Relief Assn.,* 77 Or. 349 (150 Pac. 270, 151 Pac. 476). These cases are not applicable to the matter in hand. The

Finlon Case was where the insured only had a lease with an option to buy the premises. In the Oatman Case the plaintiff possessed in his own right only an undivided half of a dower interest in the realty, while the remainder of the beneficial interest was owned by several other parties including heirs of the former owner of the property. The report of the Howard Case discloses that one of the plaintiffs in fact held merely as a trustee having purchased the title with funds of an estate and for its benefit, although he took out insurance in his own name.

The defendant complains of instructions leaving to the jury the question about the ownership. Although the court ought to have taken this question from them on the documentary evidence involved, yet the error in that aspect is favorable to the defendant and it cannot complain. Reverting to the pleadings, we note that the reply avers for the first time in the history of the case that the defendant waived the defenses it sets up. It is a rule of pleading in this state that where the plaintiff relies upon a contract he must show full performance on his part or else some valid excuse, as an example of which latter waiver may be classed, and that all this must appear in his complaint. In other words, the plaintiff must state his whole cause of action and all the grounds thereof in his first pleading. He cannot aver there that he has fully complied with the contract and, when charged by the answer with shortcomings in that respect, shift his ground in his reply and show that the omissions stated by the defendant were waived by it thus excusing the plaintiff from performance: *Cranston* v. *West Coast Life Ins. Co.*, 63 Or. 427 (128 Pac. 427); *Squires* v. *Modern Brotherhood*, 68 Or. 336 (135 Pac. 774); *Decker* v. *Jordan*, 79 Or. 109 (154 Pac. 431).

Error is predicated upon the court's giving this instruction, among others:

"You are further instructed if you find that at the time this policy was issued on the building that this building was not used for dwelling-house purposes, and was not used as a dwelling-house in the common acceptation of that term, I instruct you that the plaintiff cannot recover in this case, and your verdict must be for the defendant, unless the company knowing of the facts, went ahead and issued the insurance."

The latter clause about the company acting with knowledge of the facts is referable to the doctrine of waiver and was erroneous because that issue was not properly pleaded so as to be a matter for consideration. Conceding that the statement in the third affirmative defense was invalid, yet, even then the giving of the instruction above quoted would be abstract and would work out a reversal under the doctrine of *Tonseth* v. *Portland Ry., L. & P. Co.*, 70 Or. 341 (141 Pac. 868).

The defendant complains of some of the instructions given by the court relating to fraud and misrepresentation. It has no sufficient foundation in its pleading, however, to uphold its contention against that class of directions to the jury. In *Anderson* v. *Adams*, 43 Or. 621, 637 (74 Pac. 215), Mr. Chief Justice MOORE succinctly lays down the rule affecting the pleading of fraud thus:

"To constitute a fraud by false representations, so as to entitle the plaintiff to relief, three things must concur: (1) There must be a knowingly false representation; (2) the plaintiff must have believed it to be true, relied thereon, and have been deceived thereby; and (3) that such representation was of matter relating to the contract about which the representation was made, which, if true, would have been to plaintiff's ad-

vantage, but, being false, caused him damage and injury"—citing authorities.

This rule has been followed in many other subsequent cases, for instance, in *Wheelwright* v. *Vanderbuilt*, 69 Or. 326 (138 Pac. 857); and in *Outcault Advertising Co.* v. *Buell*, 71 Or. 52 (141 Pac. 1020). The first affirmative defense falls far short of complying with this standard. It does not show that the defendant believed the representations or that it relied upon them; and, moreover, it does not disclose wherein it was damaged by the alleged fraud, or how its risk was increased thereby. It is true it states that the building insured was known as "The Hut" which the defendant had previously refused to insure, and that in order to obtain the policy the plaintiff represented that it was not "The Hut" but a dwelling situated on Willamette Heights. The name of a structure does not necessarily make it uninsurable or a more dangerous risk. There is nothing in the boards, or beams or bricks of a house by whatever name called that *per se* makes it an undesirable risk. In short, matter showing the materiality of the representations should be averred so as to enable the court to draw a conclusion that the representations were fraudulent. On this point the error was in submitting the questions of fraud to the jury at all. All the challenged instructions, however, contain the element of waiver which as we have shown was not properly in the case and, whether abstract, or in fact faulty, the error thus committed is sufficient to reverse the case. The cause is therefore remanded to the Circuit Court for further proceedings not inconsistent with this opinion.

REVERSED AND REMANDED.

MR. CHIEF JUSTICE MCBRIDE, MR. JUSTICE BENSON and MR. JUSTICE HARRIS concur.

Argued April 11, reversed April 24, rehearing denied May 22, 1917.

WEST v. SCOTT-McCLURE LAND CO.

(164 Pac. 554.)

Municipal Corporations—Benefit Assessments—Appeal to Circuit Court.

1. Portland City charter provides for reassessment against property whenever a benefit assessment has been set aside or declared void, or its enforcement refused by any court, directly or indirectly, or when the council shall be in doubt as to its validity. Section 400 relates to procedure. Section 401 provides that one who has filed objections to a reassessment or new assessment which have not been satisfied, etc., may appeal to the Circuit Court of a named county, and that the jury shall view the property assessed, and its verdict shall be final and conclusive, etc. If the assessment is not paid within 30 days, the treasurer may collect delinquent assessments by sale in the manner provided by law for the sale of real property on execution, except as in the charter otherwise provided, and the purchase price is limited to the unpaid assessment and the interest and cost of advertising and sale. The sale conveys to the purchaser subject to redemption all the estate, interest, or claim of any person, together with all rights, etc. No levy is required except that a notice shall be posted four weeks upon every lot assessed to an unknown owner. Defendant purchased plaintiff's land at a sale by the city of Portland after an appeal by plaintiff to the Circuit Court on the amount of benefits to be assessed against his property, the result of which was that the original apportionment by ordinance making the assessment was affirmed: Sections 411 and 412. It is contended that the judgment of the Circuit Court must be enforced by execution; that a sale by the treasurer for liquidation of the demand was void and created no right or claim in the purchaser. *Held,* that authority for such sequestration of property must be found in the charter and pursued strictly, and that the only question to be determined by the Circuit Court is the amount of special benefits assessed to the property, and the assessment is to be enforced by sale of property by the treasurer; no execution being required.

[As to nature of proceedings to collect improvement taxes, see note in 133 **Am. St. Rep.** 930.]

Municipal Corporations—Assessments—Void Sale—Rights of Purchaser—Repayment of Sale Price.

2. City Charter of Portland, Section 419, requiring plaintiff in a suit to quiet title to land sold for delinquent assessments to deposit in court with his first pleading the purchase price at the previous sale with penalty and interest to be paid to the purchaser in case the right or title of such purchaser at such sale shall fail in such action, suit or proceeding, is unconstitutional and void, since it is in effect taking one man's property and giving it to another.

From Multnomah: Robert G. Morrow, Judge.

This is a suit by Fred West against the Scott-McClure Land Company, a corporation, to quiet title. From a decree in favor of plaintiff, defendant appealed. Reversed.

Department 1. Statement by Mr. Justice Burnett.

This is a suit to quiet title to real property in the City of Portland. The complaint is in the usual form and calls upon the defendant to set forth its estate in the land to the end that the plaintiff's title may be declared paramount to and exclusive of the claims of the adverse party. There are two defenses, one in abatement and the other to the merits. The first gives a brief history of the action of the city council of Portland under its ordinance No. 24,280, entitled "An Ordinance making a reassessment for the construction of a sewer system known as Riverside District Sewer," culminating in a sale of the realty in question on May 14, 1914, by the treasurer of the City of Portland who is ex officio collector of delinquent assessments. The defendant bought the tract thus offered for $100.65, and received a certificate from the treasurer to that effect. The plea in abatement closes with the declaration:

"That the plaintiff has not tendered or paid into court the said sum of money for which said property was sold or any part thereof, or any interest or penalty thereon as provided in said certificate of sale and as provided in the charter of the City of Portland."

The defense to the merits gives a more detailed history of the proceedings of the city under the ordinance mentioned, including an appeal by the plaintiff here to the Circuit Court of Multnomah County on the

amount of benefits to be assessed against the land, the result of which was that the original apportionment as declared by the ordinance was in all things affirmed. It is said that the judgment of the Circuit Court therein has never been vacated nor set aside and the assessment has never been paid. Then follow allegations respecting the further action of the city treasurer terminating in a sale by that officer to the defendant and an issuance to it of the treasurer's certificate of which it is still the holder whereby the defendant claims a lien was created upon the premises in its favor. The Circuit Court sustained a general demurrer to both defenses. The defendant declined further to plead and there followed a decree quieting the title of the plaintiff and awarding him costs and disbursements. The defendant appeals.

REVERSED.

For appellant there was a brief with oral arguments by *Mr. Lyman E. Latourette* and *Mr. Frank Schlegel.*

For respondent there was a brief over the names of *Mr. Ralph R. Duniway* and *Mr. C. L. Whealdon,* with an oral argument by *Mr. Duniway.*

MR. JUSTICE BURNETT delivered the opinion of the court.

The principal contention on the part of the plaintiff in support of his demurrer to the answer on the merits is that the assessment having been taken into the Circuit Court on appeal and the matter having been determined there as stated, the result is a judgment of that court in favor of the city for the amount of the charge involved which must be enforced by an execution out of that court, in consequence of which the sale

by the treasurer for the liquidation of the demand was utterly void and created no right or claim in favor of the purchaser. The charter of Portland under which these proceedings were had provides for a reassessment against property whenever an assessment for the opening of a street or the construction or repair of a sewer shall have been set aside or declared void, or its enforcement refused by any court of this state or any federal court having jurisdiction therein, whether directly or by virtue of any decision of those tribunals or when the council shall be in doubt as to its validity in whole or in part. The procedure for that purpose is prescribed in Section 400 of the charter of Portland. Section 401 provides partly as follows:

"Any person who has filed objections to such new assessment or reassessment which have not been satisfied by the amendments made by the council may appeal to the circuit court of the state of Oregon for the county of Multnomah from the assessment against any property owned by him or in which he has an interest. * * Any number of persons may join in such appeal and the only question to be determined therein shall be the amount of special benefits equitably to be assessed against the property of each person joining in the appeal. The jury shall view the property assessed and its verdict shall be a final and conclusive determination of the question. * * And such appeal shall be conducted and be heard and determined so far as practicable in the same manner as an action at law."

It is laid down in substance in Section 402, that if the amount assessed by the jury be not less than that mentioned in the assessment appealed from, judgment, in addition to declaring the proper apportionment shall be entered against the appellant and his sureties for his proportion of the costs of such appeal. If within thirty days from the date of the entering of such assessment in the docket of city liens the sum

assessed upon any parcel of land is not wholly paid to the treasurer and his duplicate receipt therefor filed with the city auditor or the assessment is bonded as provided by law, the auditor makes up and transmits to the treasurer a list of delinquencies as they appear upon the docket, whereupon the treasurer proceeds to collect those not paid and named in such list by advertising and selling the tracts in the manner provided by law for the sale of real property on execution except as in the charter otherwise provided. The purchase price is limited to the unpaid assessment and the interest and cost of advertising and sale. The competition at the sale is on the penalty and interest, the amount being awarded to the bidder offering to take the same for the least amount of those two items. Under the charter a sale conveys to the purchaser subject to redemption as provided therein, all estate, interest, lien or claim upon the same of any person, together with all rights and appurtenances belonging thereto. No levy is required except that a notice shall be posted four weeks upon every lot assessed to an unknown owner: Sections 411 and 412.

1. Throughout it is purely a charter proceeding. Authority for this sort of sequestration of property must be found in that instrument and pursued strictly according to its terms. We note that the only question to be determined by the Circuit Court shall be the amount of special benefits to be assessed to the property of an appellant and that the verdict of the jury shall be final and conclusive. Under the municipal organic act the Circuit Court is made an instrument of the city in the process of assessment. In the matter in hand, that tribunal is not exercising the general jurisdiction conferred upon it by the constitution and laws of the state. In charter affairs it is limited

strictly to what is laid down there for it to do. It does not make a new and independent assessment. Its service is ancillary only. It merely considers and affirms or revises the amount already visited upon the property by the city ordinance. Its doings are part of the machinery of the city for its own purposes. After the court has executed its power and entered the result thereof upon its journal its function is fully performed and the result is none the less a city assessment to be enforced as required by the charter. There is no provision in that document authorizing or allowing the court to issue its own process to enforce the city's claim. The municipality itself is clothed with the only express power on that subject, which is a sale conducted by the treasurer. The mention of that means of collecting the impost upon the property is exclusive of all others. It would have been quite as competent for the legislative power to have provided that the assessment should be considered by any body of men other than the judge and jurors of the Circuit Court. The mere fact that they are regularly charged with the administration of the law in other respects does not confer upon them any more authority than what is expressed in the charter. Their function is complete when they have ascertained and declared the amount to be paid by the property holder. They are not authorized to take any other step or to actually collect the apportioned amount. The assessment does not lose its character or identity as such or become anything else because the judge and jury participated in fixing the amount and the charter having declared the manner in which city demands of that kind be collected, to wit, by a treasurer's sale, the power must be exercised in that manner and no other. This

disposes of the demurrer to the answer to the merits adversely to the plaintiff.

2. Under the precedents already established in this state, however, a different conclusion must be reached on the objection to the plea in abatement. It is urged in that behalf that the plaintiff cannot maintain a suit to quiet title against a sale by the treasurer without depositing with his first pleading the amount paid by the purchaser to be turned over to the latter if his title shall fail. It has been laid down several times by this court that when a municipality has carried its proceedings to actual sale, although under a void proceeding, it has exhausted its power against the particular property; that the purchaser is subject to the rule of *caveat emptor* and has no claim against the city or the true owner of the property for reimbursement and that the city cannot again exercise its authority in the purchaser's favor to obtain for him the repayment of the purchase price: *Dowell* v. *Portland,* 13 Or. 248 (10 Pac. 308); *Keenan* v. *Portland,* 27 Or. 544 (38 Pac. 2); *Gaston* v. *Portland,* 41 Or. 373 (69 Pac. 34, 445); *Gaston* v. *Portland,* 48 Or. 82 (84 Pac. 1040); *Hughes* v. *Portland,* 53 Or. 370 (100 Pac. 942); *Evans* v. *Meridianal Co., ante,* p. 246, 163 Pac. 1165), filed April 3, 1917. The principle is thus declared respecting the charter under consideration:

"That part of Section 400 providing that, when the property has been sold for the payment of a delinquent assessment, and the sale has been declared void, the property shall be reassessed and the proceeds paid to the purchaser in the prior sale, is unconstitutional and void, because it is, in effect, the taking of one man's property and giving it to another."

The doctrine is not altered by the provisions of Section 419 requiring the plaintiff in a suit to quiet title

to deposit in court with his first pleading the purchase price at the previous sale with penalty and interest to be paid to the purchaser, "in case the right or title of such purchaser at such sale shall fail in such action, suit or proceeding." To require as a condition precedent to maintaining the suit that the plaintiff should deposit any sum of money to be given to his adversary in case of the failure of the latter's title would be merely another form of taking the property of the plaintiff and giving it to the defendant, bringing it within the principle of the excerpt above quoted. The demurrer to the plea in abatement should have been sustained. For the reasons already stated, however, the demurrer to the defense on the merits was not well taken and the decree of the Circuit Court is therefore reversed.

REVERSED. REHEARING DENIED.

MR. CHIEF JUSTICE MCBRIDE, MR. JUSTICE BENSON and MR. JUSTICE HARRIS concur.

Motion to dismiss appeal allowed May 22, 1917.

WINDSOR v. HOLLOWAY.

(164 Pac. 1177.)

Costs—Payment—Stay of Subsequent Suit.

1. It is within the discretionary power of a court to stay proceedings in a suit until the plaintiff therein shall have paid the costs assessed against him in a prior suit between the same parties, involving substantially the same matter and praying for the same relief.

Appeal and Error—Decisions Appealable—Stay of Proceedings—Costs.

2. An order providing that plaintiff shall pay the costs of prior suit within 90 days, and in default thereof his suit shall be dismissed, is interlocutory and not appealable pending expiration of the 90 days.

Costs—Payment—Stay of Proceedings—Discretion.

3. Where a decree was entered enjoining a judgment creditor from setting up, prosecuting or attempting to proceed on the judgments, and such decree was not set aside or any attempt made to set aside same, the entry of an order in a subsequent suit between the same parties, involving the same subject matter and the same relief, requiring that plaintiff pay the costs of the prior suit within 90 days and in default thereof his suit be dismissed, was not an abuse of discretion, where it was not denied that the judgments had been satisfied, though it was alleged that false testimony was introduced in the former case.

Judgment—Res Judicata.

4. Until the first decree has been set aside, a suit will not lie to retry a case between the same parties, involving the same subject matter and the same relief.

Judgment—Impeachment—Perjured Testimony.

5. A decree cannot be impeached in a suit in equity merely on allegations that it was procured by perjured testimony.

From Multnomah: ROBERT G. MORROW, Judge.

This hearing is upon a motion to dismiss an appeal in the suit of J. C. Windsor against Edward Holloway, Henry Hagelstein, C. E. Belding, E. W. Oliver, F. C. Dillingham and H. A. Lewis. Motion allowed.

In Banc. Statement by MR. CHIEF JUSTICE MCBRIDE.

This is an appeal from an order of the Circuit Court staying proceedings in the present case until the costs of another suit brought by plaintiff, involving substantially the same matter and praying for the same relief, should be paid. The order provided that the plaintiff should pay the costs of the prior suit within 90 days, and in default thereof his suit should be dismissed. Before the expiration of the 90 days prescribed by the court plaintiff took this appeal which defendants move to dismiss. DISMISSED.

Messrs. Veazie, McCourt & Veazie, for the motion.

Mr. Enoch B. Dufur, contra.

Opinion by MR. CHIEF JUSTICE MCBRIDE.

The power of the court to make the order is amply sustained by the authorities: *Schwede* v. *Hemrich,* 29 Wash. 124 (69 Pac. 643); *Carrothers* v. *Carrothers,* 107 Ind. 530 (8 N. E. 563); *Ex parte Shear* (*Shear* v. *Box*), 92 Ala. 596 (8 South. 792, 11 L. R. A. 620, and notes); *Buckles* v. *Chicago M. & St. P. Ry. Co.,* 47 Fed. 424. The order was interlocutory and was not appealable pending the expiration of the 90 days given plaintiff in which to comply therewith: *Roth* v. *Wallach,* 59 Misc. Rep. 515 (110 N. Y. Supp. 934); *Trogdon* v. *Brinegar,* 26 Ind. App. 441 (59 N. E. 1066). There was no abuse of discretion by the court. In a prior suit between the same parties, wherein the same subject matter was involved and the identical relief sought as in the present case, there was a decree in favor of the defendants declaring that the judgments mentioned in the plaintiff's complaint therein, the satisfaction of which plaintiff was seeking by that suit to set aside, had been fully discharged and satisfied, and the plaintiff was enjoined from setting up, prosecuting or attempting to proceed upon said judgments: *Windsor* v. *Mourer et al.,* 76 Or. 281 (147 Pac. 533, 1190). That decree has never been set aside, nor is there any attempt to set it aside in the present suit, in which it is alleged that certain material evidence used in the former cause was false and forged, and that such forgery was unknown to plaintiff at the time of the trial, although known to the defendants.

This is an attempt to retry the case in another suit without setting aside the first decree, which cannot be done. In addition the weight of authority is to the effect that a decree cannot be impeached in a suit in equity merely upon allegations that it was procured

by perjured testimony: 23 Cyc. 1027, 1028; *Friese* v. *Hummel*, 26 Or. 145 (37 Pac. 458, 46 Am. St. Rep. 610). The reason for this rule is obvious. If a defeated party can be allowed to retry a suit on the ground that material testimony given therein was perjury, by the same token he could, if defeated, retry the second suit by alleging that perjured testimony had been introduced, and so on so long as he had the means to maintain successive suits. The court, no doubt took into consideration the previous litigation between the parties, the vagueness of the allegations in the complaint, and the failure of the plaintiff upon the former trial to produce the testimony of Mrs. Campbell, or to take her deposition, although the genuineness of the power of attorney and the satisfaction of the judgment were controverted questions in that suit. The failure of Mrs. Campbell in her affidavit filed upon the present motion to deny that she received from the defendants $6,570 in settlement of the judgments and for the purpose of having them satisfied throws such suspicion on the *bona fides* of the case that we cannot say the court abused its discretion in requiring the plaintiff to pay the costs incurred upon the trial of the former cases before requiring the defendants to relitigate the same matter which had been decided in a previous suit. THE APPEAL IS DISMISSED.

Submitted on demurrer April 24, sustained May 22, 1917.

STATE ex Rel. v. PRENDERGAST.

(164 Pac. 1178.)

Attorney and Client—Disbarment Proceedings—Complaint.

1. In proceedings under Section 1092, subdivision 1, L. O. L., providing that an attorney may be removed or suspended from practice "upon his being convicted of any felony or of a misdemeanor involving moral turpitude," a complaint charging merely that the defendant was convicted in federal court of using the mails to defraud in violation of Penal Code U. S. (Act Cong. March 4, 1909, c. 321, 35 Stat. 1130 [Comp. Stats. 1916, § 10,385]) Section 215, was demurrable in the absence of specific and substantive charge that he actually committed the offense of which he was convicted.

[As to grounds for disbarring an attorney, see note in 45 **Am. St. Rep.** 71.]

Disbarment proceedings in the Supreme Court.

In Banc. Statement by Mr. Chief Justice McBride.

This is a disbarment proceeding instituted by the state upon relation of the grievance committee of the Oregon bar association. The complaint charges, in substance:

"5. That on, to wit, the last day of July, 1916, a Grand Jury, duly empaneled in the District Court of the United States for the District of Oregon, returned an indictment against the said Wm. J. Prendergast for violation of Section 215 of the Federal Penal Code; that in the said indictment it was charged that Wm. J. Prendergast on, to wit, the 9th day of February, 1916, in the City of Portland, in the State and District of Oregon, having devised and intending to devise a scheme and artifice to defraud various and sundry persons named in said indictment, and for the purpose of furthering and executing said scheme and artifice to defraud, and for obtaining money and property by means of false and fraudulent pretenses, representations, and promises, did knowingly, willfully, unlawfully, and feloniously place and cause to be placed in

the postoffice at Portland, Oregon, certain letters and other mailable matter to the said various and sundry persons therein named, contrary to the form of statute in such case made and provided and against the peace and dignity of the United States of America; and that by means of said scheme and artifice so contrived and conceived the said Wm. J. Prendergast did defraud various and sundry individuals out of money, all contrary to the form of statute in such case made and provided.

"6. That on, to wit, July 6, 1916, Wm. J. Prendergast was arrested on said charge, and at a regular term of the District Court of the United States, for the District of Oregon, held at the Federal Court House in Portland, Oregon, on the 17th day of November, 1916, the said Wm. J. Prendergast was duly and legally tried and convicted of the crime charged in said indictment, to wit, using the mails of the United States to defraud; that judgment was by the said District Court of the United States, for the District of Oregon, pronounced against Wm. J. Prendergast and he was sentenced and ordered to pay a fine of $800; and that on, to wit, the 5th day of February, 1917, the said Wm. J. Prendergast did pay said fine, whereby, and by reason whereof, said judgment of conviction became and is final against the said Wm. J. Prendergast.

"7. That Wm. J. Prendergast has been, by reason of the proceedings herein referred to, convicted of a felony and a crime involving moral turpitude; that by reason of the said conviction the said Wm. J. Prendergast has forfeited all rights to practice in or appear before this or any other court of the State of Oregon; and that the said Wm. J. Prendergast should be required and cited to show cause why he should not be disbarred from further practice before the courts of the State of Oregon, and this court's records purged of his name."

The statute applicable to this subject is found in Section 1092, subd. 1, L. O. L., and provides that an attorney may be removed or suspended from practice

"upon his being convicted of any felony or of a misdemeanor involving moral turpitude, in either of which cases the record of his conviction is conclusive evidence."

The defendant demurs generally to the complaint.

DEMURRER SUSTAINED.

Mr. Ralph E. Moody, for defendant.

Mr. Elton Watkins, for plaintiff.

Opinion by MR. CHIEF JUSTICE MCBRIDE.

The facts recited in the indictment upon which the defendant was convicted indicate that he was guilty of the use of the United States mails with intent to defraud; and while this is an offense against the laws of the United States and is declared to be a felony it is not so under the laws of Oregon. In *Ex parte Biggs,* 52 Or. 433 (97 Pac. 713), it was held that the words "felony" and "misdemeanor" were used in their statutory sense, and that there being no such offense as that of which the defendant was convicted in the federal court an allegation of such trial and conviction was, in the absence of a specific and substantive charge that he actually committed the offense of which he was convicted, insufficient to sustain a charge of violation of Section 1092, subd. 1, L. O. L. The complaint in the matter at bar does not charge the defendant with defrauding or attempting to defraud any one by an unlawful use of the mails, but merely recites that he was so charged in an indictment found in the federal courts. If the same accusation made in the federal court had been made in the complaint in the matter at bar, the record of defendant's conviction would probably be conclusive evi-

dence of his violation of his duty as an attorney, but there would still be open for inquiry the question of the extent of his guilt as a means of determining the nature of the penalty to be imposed. Such seems to be the line of the reasoning adopted by Chief Justice BEAN in *Ex parte Biggs*, 52 Or. 433 (97 Pac. 713), which we follow in this case.

The demurrer will be sustained and the relator will have 30 days within which to file an amended complaint. DEMURRER SUSTAINED.

Argued May 7, affirmed May 22, 1917.

TONEY *v.* TONEY.

(165 Pac. 221.)

Deeds—Recital of Consideration—Contradiction.

1. Where a deed is attacked on the ground of fraud or imposition, the recital of a consideration therein is only *prima facie* evidence that the consideration has in fact been paid; a fraudulent grantee cannot tie the hands of a court of equity by inserting in the deed such a recital contrary to the fact.

[As to consideration merely nominal in deed as affecting the question whether a gift was intended, see note in 65 **Am. St. Rep.** 798.]

Trusts—Resulting Trusts—Conveyance Without Consideration.

2. Where property is conveyed without consideration, and the circumstances unequivocally rebut the presumption of a gift, equity will charge the grantee with a resulting trust in favor of the grantor.

Husband and Wife—Conveyance—Presumption of Gift—Circumstances Rebutting.

3. Where a wife sued her husband for divorce, their married life having been infelicitous, and he contested the suit, being obliged to provide his wife with suit money, and, after decree of divorce for the wife, she sued out execution, and compelled her husband to pay the money adjudged to be due her with costs, and later the wife attached an interest which the husband had in a millinery store, and seized some of his clothing and personal effects, and carried it away with her, and demanded that he pay her $50 as a consideration for its return, the circumstances were such as to clearly rebut the presumption that the husband intended to make a gift to his wife when

he conveyed to her, without consideration, property worth about $6,000.

Deeds—Intoxication—Sufficiency of Evidence.

4. In a suit by a divorced husband to set aside a deed to his wife on the grounds that it was executed without consideration when he was intoxicated, and was a victim of fraud, artifice and imposition, evidence *held* to show that the wife defrauded and imposed on her husband, taking advantage of him when he was intoxicated, pursuant to a design to despoil him of all his property.

Cancellation of Instruments—Inadequacy of Consideration.

5. Inadequacy of consideration may be so gross as to shock the conscience, and in such case equity will seize on slight circumstances of fraud and oppression as a ground for setting aside the transaction, a principle applicable to a transfer without any consideration, where the relations of the parties preclude the conclusion that a gift was intended.

From Baker: GUSTAV ANDERSON, Judge.

This is a suit by Jesse D. Toney against Alta E. Toney and another to set aside a deed. From a decree in favor of plaintiff, defendant Alta E. Toney appeals. Affirmed.

In Banc. Statement by MR. JUSTICE MCCAMANT.

This is a suit brought to set aside a deed executed by plaintiff in favor of appellant on the 7th of September, 1915, to Lot 6 in Block R, Lot 9 in Block F, and Lots 4, 7 and 8 in Block L, in the townsite of Haines, Baker County; the said deed also purports to transfer to appellant some furniture and household goods and an automobile. It appears that plaintiff and appellant were married in November, 1911. That in October, 1914, appellant brought suit for divorce against plaintiff. The suit was contested. A decree was passed on the 25th of June, 1915, granting appellant a divorce, giving her a money judgment for $1,063.33 and a one-third interest in the property in dispute in this case, all of which belonged to plaintiff prior to the date of the said decree. Appellant was also given by the decree, a one-ninth interest in 280

acres of land in Baker County, an undivided one-third interest in which had belonged to plaintiff. Immediately after the entry of the decree in her favor appellant issued execution, levied on plaintiff's property and forced payment of her money judgment. Appellant subsequently sold to plaintiff's brothers her undivided interest in the 280 acres of land, receiving therefor $1,667. On the 31st of August appellant brought suit against plaintiff for the partition of the property involved in this litigation, and a few days thereafter plaintiff executed the deed in controversy. Appellant having acquired all of the property involved in the partition suit, this suit was dismissed. The case at bar was brought on the 25th of April, 1916. Plaintiff bases his claim to a cancellation of the deed on the fact that it was executed without consideration; that he was intoxicated at the time when the deed was executed, and that he was the victim of fraud, artifice and imposition on the part of appellant. Shortly after the bringing of this suit, and on the 8th of May, 1916, a deed was placed of record in Baker County whereby appellant transferred the property in dispute to O. C. Olsen. A supplemental complaint was filed joining Olsen as a party defendant, and subsequently, and under date of July 1, 1916, Olsen reconveyed to appellant. No answer was filed by Olsen, nor was he called as a witness. The findings of the lower court were in accord with plaintiff's contentions, and a decree was entered setting aside the deed and giving plaintiff judgment against appellant for $1,400, being the value of the automobile, and $500 being the value of the furniture and household goods. This personal property had been taken out of the state by appellant, and the only relief which an Oregon court could give plaintiff

was a money judgment for the value of the property. The defendant Alta E. Toney appeals. AFFIRMED.

For appellant there was a brief over the names of *Messrs. Cordiner & Cordiner* and *Mr. Orville B. Mount*, with an oral argument by *Mr. J. B. Cordiner*.

For respondent there was a brief over the names of *Mr. Joseph J. Heilner* and *Mr. James H. Nichols*, with an oral argument by *Mr. Heilner*.

MR. JUSTICE MCCAMANT delivered the opinion of the court.

Appellant's explanation of the execution of the deed in controversy is that plaintiff sought an interview with her on the morning of September 6, 1915; that he expressed a desire that appellant should have all of the property involved in the partition suit, stating that he had not treated her properly during their married life. She claims that the deed was executed pursuant to this understanding, and that plaintiff thoroughly understood its import. Plaintiff claims that an arrangement was entered into between the parties on this same day for the settlement of the partition suit, appellant to take two houses, including the one in which the parties had been living, and plaintiff to take the remainder of the property. Plaintiff testifies that he suggested that the parties should go over to the bank in Haines and execute the necessary deeds; that appellant refused to do this, insisting that the papers should be made out by her attorney at La Grande; that on the following day the parties went to La Grande and that appellant fraudulently prepared a deed covering all of the property involved in the partition suit, the household furniture and effects, and

plaintiff's automobile as well. Plaintiff further claims that while he was under the influence of liquor he was induced to sign the deed without reading it, under the belief induced by appellant that the deed was operative merely to convey to appellant that portion of the real property which she was to receive under the verbal agreement entered into for the settlement of the partition suit.

The deed recites a consideration of $1 and other valuable considerations. Appellant contends that this recital is binding on plaintiff, and that evidence is not admissible for the purpose of showing that the conveyance was executed without consideration. In support of this contention the case of *Finlayson* v. *Finlayson*, 17 Or. 347 (21 Pac. 57, 11 Am. St. Rep. 836, 3 L. R. A. 801), is cited. If this case sustains the contention of appellant in this regard, it must be deemed to be overruled by the later decisions of *Velten* v. *Carmack*, 23 Or. 282, 288 (31 Pac. 658, 20 L. R. A. 101), and *North American Securities Co.* v. *Cole*, 61 Or. 1, 6 (118 Pac. 1032). These later decisions establish the principle that where a deed is attacked on the ground of fraud or imposition the recital of a consideration therein is only *prima facie* evidence that the consideration has in fact been paid. A fraudulent grantee, in other words, cannot tie the hands of a court of equity by inserting in the deed such a recital contrary to the fact. This we understand to be the rule in other jurisdictions: 13 Cyc. 614; 17 Cyc. 651, 652, and cases cited. In this case there is no contention that a consideration was given plaintiff for the property described in the deed. The evidence indicates that the property was worth in the neighborhood of $6,000. Where property is conveyed without con-

sideration and the circumstances unequivocally rebut the presumption of a gift, equity will charge the grantee with a resulting trust in favor of the grantor: *Bennett* v. *Huston*, 33 Ark. 762; *Giffen* v. *Taylor*, 139 Ind. 573 (37 N. E. 392); *Myers* v. *Jackson*, 135 Ind. 136 (34 N. E. 810, 812); *Lingenfelter* v. *Ritchey*, 58 Pa. St. 485 (98 Am. Dec. 308); *McDermith* v. *Voorhees*, 16 Colo. 402 (27 Pac. 250, 25 Am. St. Rep. 286). This court is committed to a doctrine closely approaching that announced in the foregoing authorities: *Gray* v. *Beard*, 66 Or. 59, 68 (133 Pac. 791). Do the circumstances of this case clearly rebut the presumption that plaintiff intended to give the property in dispute to appellant? It appears from the testimony that both plaintiff and appellant had been previously married; that their married life was infelicitous; that the divorce suit was contested; that during the pendency of the suit plaintiff was obliged by the court to provide appellant with suit money; that immediately after the divorce decree appellant sued out execution thereon and compelled plaintiff to pay the money adjudged to be due her with accruing costs. The partition suit seems to have been brought by appellant without any effort to divide the property amicably. These facts would seem to preclude any contention that the relations between the parties were cordial at the time when the deed was executed in appellant's favor. The antagonistic relations of the parties are further emphasized by circumstances which transpired subsequently. In December, 1915, on the maturity of a note for $600 which plaintiff had given appellant, she assigned the note to one E. C. Tuckey, brought action thereon in Tuckey's name and attached an interest which plaintiff had in a millinery store. Thereafter appellant seized some clothing and personal

effects belonging to plaintiff, and to which appellant had no claim of any kind. She carried this property with her to Spokane, and demanded that plaintiff should pay her $50 as a consideration for its return to him. We have no hesitation in saying that the evidence in the case at bar forecloses any contention that plaintiff intended to present appellant with the property described in this deed. In so far as the case involves the real property, we think it clear that the decree of the lower court can be upheld under the doctrine of a resulting trust.

We also think that the evidence sustains plaintiff's contentions as to fraud and imposition. It appears by an overwhelming preponderance of the testimony that plaintiff for many years had been a drinking man; that his marital troubles drove him to excessive drinking in the summer of 1915; that he was under the influence of liquor more or less for a number of months at that time, and that by the 7th of September his system was so poisoned with alcohol as to make him an easy prey to the avarice of appellant. While appellant testifies that she saw but little of plaintiff during the summer of 1915, her testimony in this respect, as in other respects, is unbelievable. The parties were living at that time in the same house in the village of Haines. Appellant must have seen plaintiff every day, and must have been fully apprised of his habits and the mental condition arising therefrom. Appellant cites 17 Am. & Eng. Enc. of Law (2 ed.), 401. In this authority the following principle is announced:

"Where a person seeks to avoid responsibility for a contract on the ground of intoxication alone, it must appear that the drunkenness was so excessive that he was utterly deprived of the use of his reason and understanding, and was altogether incapable of knowing the effect of what he was doing."

This authority was called to the attention of this court in the case of *Fagan* v. *Wiley*, 49 Or. 480, 484 (90 Pac. 910). While the rule announced in the Encyclopedia was accepted as a correct statement of the law, it was also held in the above case that where a party under the influence of liquor purchases property at an exorbitant price the burden devolves on the vendor of showing the perfect good faith of the transaction. In this case we are dealing with a conveyance wholly without consideration. While the evidence fails to show that plaintiff was utterly deprived of the use of his reason and understanding at the time when he executed the deed, it does show that he was broken both mentally and physically as the result of continued excessive indulgence in drink. It appears that he had been drinking for an hour at Haines before he went with appellant to La Grande to execute the deed, and that while the deed was being prepared he was drinking mixed drinks in a saloon in La Grande. It further appears that when he returned to Haines after executing the deed later on the same day he was visibly intoxicated. The principle cited in the Encyclopedia of Law is also announced in Ruling Case Law. It is qualified, however, by the following language:

"It should be noted, however, that complete intoxication is necessary only when the contract is sought to be avoided on the ground of mental incapacity. Where the avoidance is sought on the ground of fraud, even partial intoxication may be sufficient if it was brought about by the act or connivance of the other party or if an undue advantage was taken of the intoxicated person": 6 R. C. L. 598.

We think this case is clearly one wherein appellant took advantage of an intoxicated person, pursuant to

a design to despoil him of substantially all he had in the world.

Inadequacy of consideration may be so gross as to shock the conscience and in such case equity will seize on slight circumstances of fraud and oppression as a ground for setting aside the transaction: 4 R. C. L. 501; *Archer* v. *Lapp*, 12 Or. 196, 202 (6 Pac. 672); *Sherman* v. *Glick*, 71 Or. 451, 461 (142 Pac. 606). This principle is applicable to a transfer of property without any consideration to support it, where the relations of the parties preclude the conclusion that a gift was intended. The evidence clearly shows that plaintiff remained ignorant of the contents and effect of this deed for months after its execution.

There are other circumstances in the record which strongly tend to prove appellant's bad faith. Although plaintiff's automobile was transferred to appellant by the deed in question plaintiff continued to use the automobile for approximately two months after the execution of the deed. At the end of that time appellant drove the automobile to La Grande and executed a bill of sale thereof in favor of her attorney. The testimony on appellant's behalf is that the bill of sale was given to secure a fee of $75 which she owed her attorney, but it also appears that appellant was in funds and able to pay any debt of that size which she owed; also that her attorney was advised of her circumstances and knew that she was solvent and that any claim he had against her was good without security.

We are satisfied from the evidence that the deed executed by appellant in favor of the defendant Olsen was executed with intent to put the property out of the reach of plaintiff. It appears that the deed was antedated, and the circumstances suggest that it was exe-

cuted immediately after plaintiff received her copy of the summons and complaint in this case. Her explanation of the transaction is unbelievable and the ingenuity of her counsel has been able to suggest nothing which can account for this deed on any other theory than that above suggested.

Appellant's effort to cover up the property and thus to deprive plaintiff of his remedy discredits appellant's contentions. The evidence amply sustains the findings and conclusions of the lower court. The decree of the lower court is affirmed. AFFIRMED.

Argued May 7, reversed and remanded with directions May 22, 1917.

ENTERPRISE MERCANTILE & MILLING CO *v.* CUNNINGHAM.

(165 Pac. 224.)

Replevin—Complaint—Sufficiency.

1. A complaint in replevin seeking to recover possession of a dwelling-house on the land of the defendant, which recites no facts to overcome the presumption that the building was real estate, was insufficient, and a demurrer thereto should have been sustained.

Fixtures—Severance of House—Replevin.

2. Negotiations by a homesteader for the sale of his improvements together with a relinquishment of his possessory right to the land as homesteader did not constitute a constructive severance of the house from the realty, which would entitle a creditor to replevin the house as personal property.

Fixtures—Conversion or Change of Form—Severance of House.

3. Constructive severance of a fixture must arise from the intention of the owner as evidenced by his acts, and the disclosed purpose of a future severance would not change the character of a building from real estate to personal property.

[As to tests for determining what are fixtures, see note in 105 **Am. St. Rep.** 646.]

From Wallowa: JOHN W. KNOWLES, Judge.

This is an action in replevin by the Enterprise Mercantile & Milling Company, a corporation, against

D. M. Cunningham. From a verdict and judgment in favor of plaintiff, defendant appeals. Reversed and remanded with directions to enter judgment for the defendant. Reversed and remanded.

In Banc. Statement by MR. JUSTICE BENSON.

Plaintiff began an action in replevin alleging *inter alia:*

"That plaintiff is the owner of and entitled to the immediate possession of the following described personal property: One small dwelling house situated on the northwest quarter of the southeast quarter section twenty in township one south of range forty-five E. W. M. and of the value of one hundred dollars."

Then follow allegations of the wrongful withholding of possession to plaintiff's damage and a prayer for judgment.

Defendant demurred to the complaint contending that it appears therefrom that the property of which recovery is sought is real estate and therefore not subject to replevin. The demurrer having been overruled, defendant answered with a general denial. Upon the trial defendant objected to the introduction of any evidence by plaintiff for the reason that the complaint does not state a cause of action. The objection being overruled, the trial proceeded, resulting in a judgment for plaintiff from which defendant appeals.

REVERSED AND REMANDED WITH DIRECTIONS.

For appellant there was a brief and an oral argument by *Mr. Daniel W. Sheahan.*

For respondent there was a brief and an oral argument by *Mr. James A. Burleigh.*

MR. JUSTICE BENSON delivered the opinion of the court.

There are 17 assignments of error but we shall consider but 2: (1) The demurrer to the complaint; and (2) the defendant's motion for a directed verdict.

The complaint seeks to recover possession of a dwelling-house located on land of the defendants but recites no facts which would take the property out of the classification of real estate where, *prima facie*, it belongs. The opposing counsel have each cited a single case supporting their several contentions. Plaintiff relies upon *Brearley* v. *Cox*, 24 N. J. Law, 287, which supports his claim that the pleading is sufficient. Defendant cites *Bridges* v. *Thomas*, 8 Okl. 620, 624 (58 Pac. 955), which says:

"In our judgment the court correctly sustained the demurrer to the petition. We have been cited to but one case which states a different rule. The supreme court of New Jersey, in the case of *Brearley* v. *Cox*, 24 N. J. Law, 287, held that it was no cause for demurrer to a declaration in replevin that it was brought for 'a barn, shingle mill, office, and shed,' for the reason that such things, while ordinarily fixtures and a part of the realty, yet they might be personalty, and whether they were or not was a matter of evidence. The case is disposed of on the theory that the facts showing whether such things were real or personal was evidence, and that it was not proper to plead evidence. We do not consider the case based on sound reasoning. There are strong reasons why the rule should be otherwise. If one is entitled to maintain the action of replevin, and to have the property seized and delivered to him, before a court should permit its process to be used to sever a building from its resting place, and cause it to be placed on wheels and transported back and forth like livestock or other chattels, the character of which cannot be questioned, the one desiring such process should be required to plead a state of

facts which, if proven, could leave no question as to his right to maintain the action, and the possession of the building."

The latter case clearly states the better rule and it is the rule already adopted by this court in *Van Orsdol* v. *Hutchcroft*, 83 Or. 567 (163 Pac. 978), in which Mr. Justice MOORE says:

"As nearly every building is put up with the intention that it shall become and remain a part of the land on which it rests, it necessarily follows that, in order to overcome the presumption that a building is real property, a pleading must allege facts showing the structure was placed on a temporary foundation and erected with the intention that it should be removed, or that it had been taken from its original support so as to be moved away."

It follows that the demurrer should have been sustained.

Even if the complaint were sufficient, the defendant's motion for a directed verdict should have been allowed, upon the evidence. There is no dispute as to the substantial facts in the case. One A. W. Fisher was the occupant of the house and the land upon which it is situated, and was indebted to the plaintiff. Fisher began negotiations with defendant for the sale of his improvements together with a relinquishment of his possessory right to the land as a homesteader. While such negotiations were pending, plaintiff began an action against Fisher and undertook to attach the house as personal property upon the theory that the negotiations for the sale of the house constituted a constructive severance of it from the realty, thereby changing its nature. Thereafter and before judgment, defendant purchased the relinquishment of the possessory right to the land together with the improvements thereon, went into possession thereof, filed the relin-

quishment and his own application for the land, and subsequently received a patent therefor. After judgment, the sheriff went through the form of an execution sale of the house at which plaintiff became the purchaser and then brought this action.

It has been held in a long line of cases that the relinquishment of the possessory right of a homesteader is a marketable commodity: *Fain* v. *United States,* 209 Fed. 525 (126 C. C. A. 347), and cases there cited. It is fundamental that a constructive severance of a fixture must arise from the intention of the owner as evidenced by his acts, and there is not a vestige of evidence in the record of any intention upon the part of Fisher to sever the house from the land and, in fact, it was never severed. Nor, indeed, could the disclosed purpose of a future severance act to change the character of the building from real estate to personal property. The motion for a directed verdict should have been allowed. The judgment will be reversed and the cause remanded with directions to enter judgment for the defendant.

REVERSED AND REMANDED WITH DIRECTIONS.

Argued May 8, affirmed May 22, 1917.

STATE *v.* NEWLIN.

(165 Pac. 225.)

Intoxicating Liquors—Sufficiency of Indictment—Statute.

1. Under the direct provisions of Laws 1915, page 166, Section 33, it is not necessary that an indictment should disclose that a party charged with the illegal sale of intoxicating liquor did not have legal authority to sell such liquor, or that he was not within any of the exceptions provided for by the act.

Intoxicating Liquors—Pleading—Proof.

2. In a prosecution for the illegal sale of intoxicating liquors, designated in the indictment as "ethyl alcohol," as "alcohol" and

"ethyl alcohol" are practically synonymous, there is no merit in the contention that in disclosing merely a sale of alcohol there was a failure of proof, and that the court erred in instructing the jury that "ethyl alcohol is, as a matter of law, intoxicating liquor."

Witnesses—Impeachment—Prior Convictions.

3. In view of statutory provision that to impeach a witness it may be shown by examination of the witness that he has been convicted either of a felony or misdemeanor, in a prosecution for the illegal sale of intoxicating liquors, where defendant testified that he had been convicted but once, the state was properly permitted to show in rebuttal that there were five prior convictions of defendant.

[As to violation of liquor law as "crime" for conviction of which witness may be impeached, see note in **Ann. Cas.** 1916A, 276.]

Intoxicating Liquors—Instructions.

4. In a prosecution for the illegal sale of intoxicating liquors, where there was evidence that a witness for the state and another went to a point near defendant's place on the day that this sale was alleged to have been made, and that such other went into the defendant's store and came out in a short time with a bottle of alcohol, from which the witness drank, the court properly refused to instruct that there was no evidence that defendant on the day stated made a sale to such person.

From Union: JOHN W. KNOWLES, Judge.

In Banc. Statement by MR. JUSTICE BENSON.

On January 20, 1917, the defendant was indicted for selling intoxicating liquor in violation of the provisions of Chapter 141 of Laws of Oregon of 1915, the charging part of the indictment reading as follows:

"The said Adolph Newlin, on the 11th day of January, 1917, in the county of Union and State of Oregon, did then and there wrongfully, wilfully and unlawfully sell intoxicating liquor, to wit—ethyl alcohol—to one Joe Hickey, by then and there, him, the said Adolph Newlin, selling and delivering the said intoxicating liquor to the said Joe Hickey, and receiving therefor, the sum of fifty cents, lawful money of the United States, contrary to the statutes in such cases made and provided, and against the peace and dignity of the State of Oregon."

To this indictment the defendant filed a general demurrer which being overruled a plea of not guilty

was entered and a trial had resulting in a judgment of conviction from which this appeal is taken.

AFFIRMED.

For appellant there was a brief over the name of *Messrs. Ivanhoe & Marker,* with an oral argument by *Mr. Francis S. Ivanhoe.*

For the State there was a brief with oral arguments by *Mr. John S. Hodgin,* District Attorney, and *Mr. George M. Brown,* Attorney General.

MR. JUSTICE BENSON delivered the opinion of the court.

It is first contended that defendant's demurrer to the indictment should have been sustained because the statute which forms the basis of the prosecution permits the sale, under certain specified restrictions, of ethyl alcohol by registered pharmacists and that in order to sufficiently describe a crime, the indictment should disclose the fact that defendant was not then one of the privileged class or that the sale was in violation of one or more of the restrictions. Section 33 of the act referred to contains the following provision:

"And it shall not be necessary in the first instance for the state to allege or prove that the party charged did not have legal authority to sell such liquor, or was not within any of the exceptions provided by this act."

We need not consider what merit might be found in defendant's contention in the absence of this clause; but, since it exists, there was no error in overruling the demurrer. The next contention is that since the evidence disclosed merely a sale of alcohol, without any specific evidence that it was ethyl alcohol, there

was a failure of proof and that the court erred in instructing the jury "ethyl alcohol is, as a matter of law, intoxicating liquor." An examination of the authorities discloses the fact that "alcohol" and "ethyl alcohol" are practically synonymous. Examining Webster's Dictionary we find it defined thus: "Alcohol: Pure spirits of wine: pure or highly rectified spirit called ethyl alcohol." The Standard Dictionary and many others support this position and therefore there is no merit in defendant's contention upon this point.

It is also urged that the trial court erred in permitting the state to offer in evidence the judgment-rolls of five prior convictions for the unlawful sale of intoxicating liquor after the defendant had admitted upon cross-examination that he had been convicted of a crime. The defendant had testified that there had been but one such conviction and in rebuttal the state was permitted to show that there had been five. In *State* v. *Bacon,* 13 Or. 143 (9 Pac. 393, 57 Am. Rep. 8), Mr. Justice LORD says:

"On the subject of the impeachment of a witness, the code provides 'that it may be shown by the examination of the witness, or the record of the judgment, that he has been convicted of a crime.' (Code, § 830, p. 274.) And the word 'crime' as defined by the code, includes both felonies and misdemeanors. It may therefore be shown by the examination of the witness that he has been convicted either of felony or a misdemeanor, and the record may also be introduced to prove that fact."

We can see no good reason for the contention that it was error to admit the evidence of more than one conviction. If the fact that a witness has been convicted of one criminal offense has a tendency to discredit his testimony, we may fairly infer that several

convictions would simply add to the effect of such inference. The following authorities support this view: 40 Cyc. 2610; *People* v. *Kelly,* 146 Cal. 119 (79 Pac. 846, 847); *People* v. *Eldridge,* 147 Cal. 782 (82 Pac. 442, 444).

It is further insisted that there was error in refusing to give to the jury the following requested instruction:

"I instruct you, gentlemen of the jury, that there is no evidence in this case, that defendant made an unlawful sale of intoxicating liquor, on the 11th day of January, 1917, to the person mentioned in the evidence as a fireman, that witness Hickey claims furnished with a bottle of alcohol; and you will not consider any testimony on this trial concerning any sale claimed to have been made by defendant to said alleged fireman, or that any such person may have furnished any intoxicating liquor to said witness, or that any liquor said witness may have received from such alleged fireman was intoxicating liquor, or that the same was ever purchased from defendant."

The court very properly refused this request for there is evidence to the effect that Hickey and a man, whose name is not disclosed but who was understood by the witness to be a fireman in the railroad service, went to a point across the street from defendant's place on the same day that the sale charged in the indictment is alleged to have occurred; that there they each contributed fifty cents for the purchase of alcohol; and that the fireman went into the defendant's store and came out in a short time with a bottle of alcohol from which the witness Hickey drank. We are not concerned as to the credibility of the evidence; that is for the jury, and it is sufficient to say that in the face of this evidence it would have been decidedly improper for the court to have given such an instruction.

There are other assignments of error but none of them are of such a nature as to change the result and they need not be considered. The judgment is affirmed.

AFFIRMED.

Submitted on brief April 17, modified May 22, 1917.

MONROE *v.* WITHYCOMBE.*

(165 Pac. 227.)

Pleading—Demurrer—Admission.

1. For purposes of an appeal, demurrers to the complaint admit the facts pleaded.

Fish—Ownership in State.

2. Fish are *ferae naturae*, and while in a state of freedom their ownership, so far as a right of property can be asserted, is in the state, not as a proprietor, but in its sovereign capacity for the benefit of and in trust for its people in common.

[As to ownership of or property in fish, see note in 131 Am. St. Rep. 751.]

Navigable Waters—Title of State to Land Under Navigable Water—Admission of Territory.

3. On its admission to the Union, Oregon was vested with title to the land under the navigable waters within the state, subject to the public right of navigation, and to the common right of citizens of the state to fish.

Fish—Regulation by State.

4. In the exercise of its police power, and for the welfare of all its citizens, the state can regulate or even prohibit the catching of fish.

Fish—Master Fish Warden—Power.

5. The master fish warden of the state, holding a position created and exercising an authority defined by the legislature, cannot do what the legislature cannot empower him to do.

Constitutional Law—Privileges and Immunities—Exclusive Right to Catch Salmon—Monopolies.

6. In Oregon, the legislature cannot grant to one person an exclusive right to catch salmon at a place and in waters where all citi-

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*As to government control over right to fish, see notes in 39 L. R. A. 581; L. R. A. 1916E, 523.

As to right to fish generally, see note in 60 L. R. A. 481.

As to what discrimination as to persons is permissible in fishing laws, see note in 26 L. R. A. (N. S.) 794. REPORTER.

zens have the right to fish, because, when that which belongs equally to all the citizens of the state is taken from all and vested in only one citizen, it is equivalent to transforming a public right into a monopoly, exercisable by only one citizen, and therefore violative of Article I, Section 20, of the Constitution, providing that no law shall be passed granting to any citizen or class of citizens privileges or immunities, which, on the same terms, shall not equally belong to all citizens.

Constitutional Law—Separation of Powers—Delegation of Legislative Power.

7. There is a large class of cases where the legislature may vest in administrative officers power to determine when particular cases do or do not fall within a competent rule established by the legislature.

Constitutional Law—Separation of Powers—Delegation of Legislative Power.

8. The legislature may delegate to a board the power to stock a stream with fish and close it against fishing, providing the order is not discriminatory.

Constitutional Law—Delegation of Legislative Power to Board—Interference by Court.

9. In cases where the legislature may delegate to and vest in an administrative board a power, the courts will not attempt to control or interfere with the judgment and discretion of the administrative officers.

Constitutional Law—Legislative Power—Delegation.

10. The legislature can neither directly nor indirectly empower a mere administrative board to do that which the legislature itself cannot do.

Fish—License to Build Fish-traps—Prior Rights—Statute.

11. Under Laws 1913, page 225, providing that it shall be unlawful for the master fish warden or board of fish commissioners to grant a license to any person to build fish-traps in any locality in the Columbia River when in their judgment the same interfere with a prior right of fishing, etc., the mere issuance by the master fish warden to defendant of licenses to build fish-traps in the Columbia River did not foreclose inquiry into the existence of prior fishing rights at the locality involved in suit by aggrieved persons to prevent the construction of the traps, since the statute makes no provision for a notice or hearing, and makes no attempt to vest the warden with judicial authority, so that the doctrine that courts cannot interfere with the judgment and discretion of administrative officers has no application.

Constitutional Law—Adjudication of Rights by Officer or Board—Statute.

12. Laws 1913, page 225, construed as an attempt to vest the master fish warden or board of fish commissioners with judicial power to adjudicate constitutional rights, would be unconstitutional to the extent of such an attempt.

Fish—Fish-traps—Confiscation of Piling—Statute.

13. Though a person licensed to do so by the master fish warden is not entitled to construct salmon traps in the Columbia River or to maintain the piling driven at each of three places, it would be inequitable to command the warden and board of fish commissioners to remove and confiscate the pilings under the provisions of Laws 1913, page 226, Section 2, when they were driven pursuant to licenses presumably issued in good faith.

From Clatsop: JAMES A. EAKIN, Judge.

In Banc. Statement by MR. JUSTICE HARRIS.

C. G. Monroe and 10 other natural persons together with the Sanborn Cutting Company, a corporation, in May, 1915, commenced this suit for themselves and all others similarly situated, or who might desire to join in the suit, for the purpose of preventing R. S. Farrell from constructing pound net fish-traps on the north shore of Welch's Island in the Columbia River, a navigable stream. The defendants are James Withycombe, I. N. Fleischner, Marion Jack, C. F. Stone and F. M. Warren, who constitute the state board of fish and game commissioners, R. E. Clanton, who holds the position of master fish warden, and R. S. Farrell who holds three licenses, issued to him on April 1, 1915, by the master fish warden, purporting to authorize the holder to construct and maintain that number of pound net fish-traps at designated places on the north shore of Welch's Island. The Sanborn Cutting Company is a corporation organized and existing under the laws of Oregon with its principal place of business in Astoria, Oregon, and is engaged in the business of catching, packing and preserving salmon. Each of the remaining plaintiffs is a citizen and resident of Oregon and is engaged in catching salmon. The corporation holds two licenses, issued on May 1, 1915, authorizing it to operate two seines in the waters of the Columbia River for the purpose of catching salmon; and each of the

remaining plaintiffs was licensed on May 1, 1915, to catch salmon in the waters of the Columbia River with a gill net.

Large quantities of salmon are found in the Columbia River and are of great commercial value. The salmon industry has grown to great proportions and for many years has been one of the principal industries of this commonwealth. Thousands of the citizens of Oregon earn their livelihood by catching salmon and annually the business aggregates hundreds of thousands of dollars. Salmon are generally taken by gill nets and seines. A gill net is made of twine so tied as to form meshes for the purpose of gilling the fish and is hung between two lines, one being known as the float because it floats on the surface, and the other as the lead because weighted down and kept beneath the surface of the water so as to suspend the net vertically. Seines are likewise made of twine, one edge of the seine being provided with floats and the other with sinkers so that it will hang vertically in the water, and when its ends are brought together or drawn ashore the seine encloses the fish caught within it. Gill nets and seines are floating fishing appliances; but a pound net fish-trap is a permanent and fixed structure. A pound net fish-trap as it is usually constructed in the Columbia River has three parts: The heart, pot and lead. The heart is constructed by selecting some point in the river, ranging from 200 to 800 feet from the shore line, according to the conditions found, and driving piling in the bed of the river so as to form the letter V with the point of the V upstream. The point of the V is not closed but it is left open and at this opening piling are driven so as to form a hollow square and this square makes the pot. Commencing at the lower end of the inner arm of the V, piling are driven

at convenient distances apart on a straight line to the shore. Webbing sufficiently wide to reach from the bed of the river to a point two or three feet above extreme high water is strung along and attached to the piling in the lead and heart of the trap. Webbing is also used in the pot but instead of being affixed to the piling it is so arranged that it can be lifted. Any salmon that migrate upstream and encounter the trap naturally attempt to pass the barrier and in making the attempt generally find their way into the heart and then into the pot of the trap where the fish are lifted from the water.

Welch's Island is within the boundaries of Oregon. Pursuing its westward course to the sea, the main channel of the river runs along the north side of Welch's Island. This channel extending along the north side of the island is not only a part of the main ship's channel, but, according to the complaint, it has also been the natural gill net and seining ground for the fishermen of the Columbia River and is "the most valuable drifting ground for gill nets and the most valuable ground for operating seines in the Columbia River." It further appears from the complaint that from time out of mind fishermen have taken salmon out of this channel and the waters along the north side of the island by means of gill nets and seines, and that during the fishing season fishermen habitually, daily and hourly navigate their gill nets and seines in these waters which, prior to the issuance of the licenses to Farrell, were universally recognized as a common ground of fishing for all fishermen operating gill nets and seines. Continuing, the complaint avers that "the citizens of the State of Oregon licensed to operate gill nets and seines are entitled of right, and are entitled under and by virtue of the laws and statutes of

the State of Oregon, to the free and unobstructed use of said channel and the waters thereof, for the purpose of navigating the same with both gill nets and seines, and have been exercising such right, accordingly as herein alleged for time immemorial."

One license attempts to authorize Farrell to construct a pound net fish-trap at a point on the north shore of the island about 800 feet from the mouth of Multnomah Slough; another trap is to be located about 4,200 feet below the first and the third is to be about 1,000 feet below the second trap. Upon receiving the licenses Farrell commenced to construct traps at the three specified places; and, unless restrained, he proposes to complete the three traps so that they will extend out into the channel for a distance of 500 or 800 feet from the shore line. The plaintiffs say that they have been using and intend to continue to use gill nets and seines in the waters of the river along the north side of the island, but if Farrell is permitted to build the traps plaintiffs will be prevented from using their seines and nets and it will have the effect of giving the exclusive use of that fishing ground to Farrell.

The plaintiffs further allege that the licenses held by Farrell were issued in violation of Chapter 128, Laws of 1913, and that although the plaintiffs petitioned to have the traps confiscated the master fish warden and board of game and fish commissioners nevertheless refused to do so.

All the defendants filed a joint demurrer; the members of the board of game and fish commissioners and the master fish warden joined in a second demurrer; and a third demurrer was filed by Farrell. The trial court overruled the three demurrers and, when the defendants declined to plead further, a decree was entered declaring that "the public have the prior right

of fishery and prior right to navigate the waters and channel of the Columbia River in front of Welch's Island" for the purpose of operating gill nets and seines, enjoining Farrell from constructing fish-traps, and commanding the board of game and fish commissioners to cancel the licenses held by Farrell within twenty days from the date of the decree. All the defendants appealed.

Submitted on brief under the proviso of Supreme Court Rule 18: 56 Or. 622 (117 Pac. xi). MODIFIED.

For appellants there was a brief over the names of *Mr. George M. Brown*, Attorney General, *Mr. Chriss A. Bell* and *Mr. Frank Spittle.*

For respondents there was a brief over the name of *Messrs. George C. & A. C. Fulton.*

MR. JUSTICE HARRIS delivered the opinion of the court.

For the purpose of this appeal the demurrers admit the facts alleged in the complaint, and consequently throughout the discussion it must be assumed that the complaint speaks the truth notwithstanding the fact that the plaintiffs make frequent use of the superlative degree. The Columbia River is a navigable stream. The waters along the north shore of the island are "the most valuable drifting ground for gill nets and the most valuable ground for operating seines on the Columbia River"; and these waters have always been "recognized as a common ground for fishing." Fish are classified as *ferae naturae,* and while in a state of freedom their ownership, so far as a right of property can be asserted, is in the state, not as a proprietor, but in its sovereign capacity for the

benefit of and in trust for its people in common: *State* v. *Hume,* 52 Or. 1, 5 (95 Pac. 808); *Portland Fish Co.* v. *Benson,* 56 Or. 147, 154 (108 Pac. 122); *State* v. *Catholic,* 75 Or. 367, 374 (147 Pac. 372); *Harper* v. *Galloway,* 58 Fla. 255 (51 South. 226, 19 Ann. Cas. 235, 26 L. R. A. (N. S.) 794); 11 R. C. L. 1041. Upon its admission to the Union, Oregon was vested with the title to land under the navigable waters within the state, subject to the public right of navigation and to the common right of the citizens of this state to fish: *Hume* v. *Rogue River Packing Co.,* 51 Or. 237, 246 (83 Pac. 391, 92 Pac. 1065, 96 Pac. 865, 131 Am. St. Rep. 732, 31 L. R. A. (N. S.) 396). Quoting the language of Mr. Justice MOORE in *Eagle Cliff Fishing Co.* v. *McGowan,* 70 Or. 1, 12 (137 Pac. 766):

"The right of fishing in a navigable stream in Oregon is free and common to all the citizens of the state."

In the exercise of its police power and for the welfare of all its citizens the state can regulate or even prohibit the catching of fish: *State* v. *Schuman,* 36 Or. 16 (58 Pac. 661, 78 Am. St. Rep. 754, 47 L. R. A. 153); *State* v. *Hume,* 52 Or. 1, 6 (95 Pac. 808); *State* v. *Catholic,* 75 Or. 367, 374 (147 Pac. 372); *Harper* v. *Galloway,* 58 Fla. 255 (51 South. 226, 19 Ann. Cas. 235, 26 L. R. A. (N. S.) 794).

Farrell relies entirely upon the three licenses from the state for his asserted right to construct the traps, and consequently the legality of the disputed right depends upon the legality of the authority attempted to be conferred. If Farrell is permitted to erect the traps specified in the licenses the traps will have the effect of excluding gill net and seine fishermen from the waters in which it is admitted that previously all the citizens of this state had a common right to fish.

In short, if it is lawful to authorize Farrell to erect these traps it is lawful to prohibit all other citizens of Oregon from exercising a right that is conceded to be common to all, and to grant to Farrell alone the exclusive right to fish in waters covering an area of more than a mile in length by 200 or more feet in width; and if it is lawful to grant to a single individual the exclusive right to fish in that area it is likewise lawful to grant an exclusive right to fish in a larger area. The licenses relied upon are issued by the master fish warden. His position is created and his authority is defined by the legislature, and therefore he cannot do what the legislature cannot empower him to do. If the legislature cannot grant an exclusive right to fish to one person, then the state could not through its master fish warden authorize the construction of the three controverted pound net fish-traps when they will have the effect of conferring an exclusive right upon a single person, because the state cannot lawfully do indirectly what it cannot do directly.

In most jurisdictions where the question has been presented for ultimate judicial decision it has been determined that the legislature has power to grant to a single person an exclusive right to catch floating fish: *Payne* v. *Providence Gas Co.*, 31 R. I. 295 (77 Atl. 145, Ann. Cas. 1912B, 65); *State* v. *Leavitt*, 105 Me. 76 (72 Atl. 875, 26 L. R. A. (N. S.) 799); *Phipps* v. *State*, 22 Md. 380 (85 Am. Dec. 654); *Commonwealth* v. *Hilton*, 174 Mass. 29 (54 N. E. 362, 45 L. R. A. 475); *Heckman* v. *Swett*, 107 Cal. 276 (40 Pac. 420); 2 Farnham on Waters and Water Rights, § 370. See also *Gough* v. *Bell*, 21 N. J. Law, 156, 165, and *Gough* v. *Bell*, 22 N. J. Law, 441, 459, criticising the prior case of *Arnold* v. *Mundy*, 6 N. J. Law, 1, 78 (10 Am. Dec. 356). In Washington it has been held that it is lawful to

grant to a single person exclusive control for a reasonable distance and for a limited period: *Walker* v. *Stone,* 17 Wash. 578 (50 Pac. 488); *Halleck* v. *Davis,* 22 Wash. 393 (60 Pac. 1116). In this jurisdiction, however, the rule is firmly established that the legislature cannot grant to one person an exclusive right to catch salmon, because when that which belongs equally to all the citizens of this state is taken from all and vested in only one citizen it is equivalent to transforming a public right, exercisable by all citizens alike, into a private right and a monopoly, exercisable by only one citizen, and it is therefore in violation of Article I, Section 20 of the state constitution which commands that "no law shall be passed granting to any citizen or class of citizens, privileges or immunities which, upon the same terms, shall not equally belong to all citizens": *Hume* v. *Rogue River Packing Co.,* 51 Or. 237, 259 (83 Pac. 391, 92 Pac. 1065, 96 Pac. 865, 131 Am. St. Rep. 732, 31 L. R. A. (N. S.) 396); *Eagle Cliff Fishing Co.* v. *McGowan,* 70 Or. 1, 15 (137 Pac. 766). See also *Slingerland* v. *International Con. Co.,* 43 App. Div. 215, 223 (60 N. Y. Supp. 12), affirmed in 169 N. Y. 60 (61 N. E. 995, 56 L. R. A. 494). Not even the legislature could have granted to Farrell the exclusive right to take salmon in waters where all the qualified citizens of Oregon have the common right to take floating fish; and therefore the licenses issued by the master fish warden do not legalize the construction of the traps which Farrell proposes to build. The question presented here is not whether all pound net fish traps are *per se* unlawful; but the sole question for decision is whether the traps which Farrell proposes to build would be unlawful, and that question is determined by the effect which it is conceded that the traps would have upon the common right of all the

qualified citizens of this state. It is not necessary to decide whether the state can lawfully empower one person to the exclusion of others, to take shell-fish from a specified area of a navigable stream whose bed is owned by the state; nor is there any need to discuss the right to erect wharves and other similar structures in aid of navigation, since the proper exercise of that right is easily distinguishable from the instant case where an attempt is made to authorize only one person to fish for salmon for his own personal benefit and private profit without any advantage to the public.

The defendants contend, however, that the issuance of the licenses to Farrell forecloses any subsequent inquiry concerning the existence of prior fishing rights. Since this contention arises out of the language found in Chapter 128, Laws 1913, such portions of the statute as are now material are here set out:

"It shall be unlawful for the master fish warden or the board of fish commissioners to grant a license to any person, firm, partnership or corporation, to build or set up fish-traps or any other fixed fishing appliance, or drive piles therefor, in any locality in or on the Columbia River and its tributaries in this State, when in their judgment the same interferes with a prior right of fishing. Section 1.

"Whenever any fish-trap or any other fixed fishing appliance is built or set up in violation of this act, the master fish warden of the State of Oregon is hereby empowered, authorized and directed to confiscate and sell said fish-trap, and to remove all the piling driven for such purposes immediately, and he is authorized and directed to pay into the hatchery fund of that district of the State of Oregon the proceeds of said sale." Section 2.

The argument of the defendants is to the effect that Chapter 128, Laws 1913, prohibits the master fish warden and board of fish commissioners from issuing

a license for a pound net fish-trap if in their judgment the trap will interfere with a prior right of fishing; that the enactment confers upon the officers power to exercise their judgment and discretion and that in the absence of fraud an exercise of such judgment and discretion will not be interfered with by the courts; that the issuance of the licenses to Farrell presupposes that the master fish warden and the board exercised their judgment and discretion and determined that the issuance of the three licenses to Farrell and the construction of the licensed traps would not interfere with any prior fishing rights; and that therefore the courts will not and cannot prevent the construction of the traps because to do so would be to interfere with and supervise the judgment and discretion of the board and master fish warden. Before attempting to discuss the argument of the defendants it is proper first to make a brief survey of the legislation in force at the time of the passage of Chapter 128, because it may be assumed that this statute was adopted with reference to the laws then in effect. Section 5272, L. O. L., created a board of fish commissioners whose duty it was to appoint one master fish warden. The name and personnel of the board has since been changed, for it is now known as the State Board of Fish and Game Commissioners: Chapter 287, Laws 1915. The board was clothed with various powers: Sections 5273, 5282, 5313 and 5316, L. O. L. Section 5237, L. O. L., defined the closed season on the Columbia west of the Deschutes River. Section 5294, L. O. L., made it unlawful to operate and maintain a pound net "without first having obtained from the fish warden a license therefor as hereinafter provided." By the terms of Section 5298a, L. O. L., a qualified person desiring to

operate a pound net was required to "make application in writing to the fish warden" specifying the location of the pound net "and upon payment of a license fee as hereinafter provided, said fish warden shall issue to such applicant a license to operate the character of appliance desired in said application." All licenses expired on the 31st day of March following their issuance: Section 5303, L. O. L. After the owner constructed a pound net he was required to file a map with the fish warden "giving the exact description and location thereof." Section 5304, L. O. L.

It is not necessary to pursue the suggestion found in *Evanhoff* v. *State Industrial Acc. Com.*, 78 Or. 503, 516 (154 Pac. 106), and determine whether the present form of our state Constitution enables the legislature to clothe the master fish warden and board of fish commissioners with judicial power to inquire into and decide upon the existence of prior fishing rights, for the reason that it is obvious that the legislature has neither given nor attempted to give the warden and board authority to render a final adjudication of constitutional rights. There is a large class of cases where the legislature may vest in administrative officers power to determine when particular cases do or do not fall within a competent rule established by the legislature: 6 R. C. L., pp. 176, 179; and likewise the legislature may delegate to a board the power to stock a stream and close it against fishing, provided the order is not discriminatory: *Portland Fish Co.* v. *Benson,* 56 Or. 147 (108 Pac. 122); 11 R. C. L. 1042; and in such classes of cases the courts will not attempt to control or interfere with the judgment and discretion of the administrative officers. There is, however, an impassable chasm between the power to prohibit all persons from fishing in a stream and an attempt to

give one person an exclusive right to fish. The power of a board to close a stream exists only because the legislature, which delegates the power, itself has power to close the stream; but not even the legislature can lawfully favor one citizen with the exclusive right to fish in a navigable stream and consequently the legislature can neither directly nor indirectly empower a mere administrative board to do that which the legislature itself cannot do. All the citizens of Oregon have a common right to fish in the waters mentioned in the complaint and to deprive any one citizen of that right is to violate the state Constitution. To say that the mere issuance of the licenses closes any further inquiry into the existence of prior fishing rights because the courts cannot interfere with the judgment and discretion of administrative officers, is to say that these plaintiffs can be deprived of a right without a hearing, without an opportunity to be heard, and even without notice. Chapter 128, Laws 1913, makes no provisions for a notice or a hearing and it makes no attempt to vest the warden or board with judicial authority; and therefore the issuance of the licenses did not involve any of the elements of a final judicial adjudication of the fishing rights of these plaintiffs. If, on the other hand, the warden and members of the board are considered as mere administrative officers without judicial powers, the licenses issued by them to Farrell are invalid because they operate to confer an exclusive right upon Farrell. While the legislature has power to authorize administrative officers to issue licenses, yet the validity of such licenses, when issued, is to be determined by the results which follow an exercise of the authority named in the license rather than by the mere words found in the paper called the license. While Chapter 128, Laws 1913, does not at-

tempt to vest the warden or board with judicial power to adjudicate constitutional rights, nevertheless, if in its present form it is regarded as an attempt to do so, it would to the extent of such an attempt be unconstitutional; if, on the other hand, the warden and board be regarded as officers with only administrative powers, the validity of the licenses issued to Farrell is to be determined by the results wrought by them, and when so determined they are ascertained to be ineffective; and therefore in either event the plaintiffs are entitled to a decree preventing the construction of the traps.

Farrell drove three piling at each of the places designated by the three licenses, and plaintiffs allege that they petitioned the master fish warden and board to remove and confiscate them pursuant to Section 2 of Chapter 128, Laws 1913. The defendants argue that when the plaintiffs petitioned for the removal and confiscation of the piling on the authority of Chapter 128, they precluded themselves from afterwards questioning the validity of the statute. It is true that the plaintiffs do contend that Chapter 128 is unconstitutional to whatever extent it may be said to attempt to confer upon the warden and board authority to render a final adjudication of fishing rights or to grant exclusive rights to fish; but it is also true that the plaintiffs never at any time contended that Section 2 was invalid or that the whole chapter was unconstitutional for all purposes, although it may be invalid to whatever extent it may attempt to confer power to adjudicate existing rights or to grant exclusive rights.

While Farrell is not entitled to construct the traps or to maintain the piling driven at each of the three places, yet it would not be equitable to command the warden and board to remove and confiscate the nine piling under the provisions of Section 2 of Chapter

128, Laws 1913, when the piling were driven pursuant to licenses which were presumably issued in good faith; and therefore the mandatory injunction prayed for by the plaintiffs is denied. The acts of the warden and board complained of by the plaintiffs were fully consummated before this suit was begun; it does not appear that the warden and board purpose to issue licenses in the future for traps along the island; and therefore the complaint and suit are dismissed without costs as to the warden and members of the board; but the licenses issued to Farrell are annulled and as to him the decree is affirmed. MODIFIED.

Submitted on briefs April 3, affirmed April 17, rehearing denied May 29, 1917.

BAGGAGE & OMNIBUS TRANSFER CO. *v.* CITY OF PORTLAND.*

(164 Pac. 570.)

Carriers—Baggage—Granting Exclusive Right to Transfer Company.

1. A railway company may legally contract with a transfer company giving it exclusive right to solicit from passengers the privilege of transferring baggage, such contracts being for the benefit of both carrier and passengers.

[As to right a railroad company has to grant exclusive privileges to hackmen and other solicitors, see note in 22 **Am. St. Rep.** 699.]

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*As to right to discriminate between hackmen and other solicitors of patronage at depots, etc., see note in 16 **L. R. A. (N. S.)** 777.

As to discrimination with reference to hackmen at depots, see note in 13 **L. R. A.** 848.

On right of carrier to grant exclusive train privileges to baggage or transfer companies, see note in 32 **L. R. A. (N. S.)** 1181.

As to right to exclude hackmen from railroad depot, see note in 39 **L. R. A. (N. S.)** 126.

On effect of discrimination by municipality in designating standing places for cabs or other similar vehicles, see note in L. R. A. 1915E, 726. REPORTER.

Carriers—Baggage—Granting Exclusive Right to Transfer Company—Constitution.

2. Article I, Section 20, of the Constitution, prohibiting passing of laws granting exclusive privileges, does not prohibit or regulate the carrier's power to grant exclusive rights to a transfer company, since it only applies to the enactment of laws.

Carriers—Baggage—Granting Exclusive Right to Transfer Company—Statute.

3. Section 6927, L. O. L., prohibiting railroads from giving "undue or unreasonable preference" to any person, does not prohibit railroads from granting exclusive privileges to transfer companies; the legislative intent being merely to prohibit the showing of preference to passengers or shippers.

Carriers—Responsibility for Baggage.

4. Railway companies are responsible, as common carriers, for loss of or damage to baggage during transportation, and for a reasonable time while baggage is in depots for delivery.

Carriers—Baggage—Regulating Use of Station.

5. Since railway companies are responsible for baggage, they may reasonably regulate use of stations, and other matters concerning the dispatch of business for that purpose.

Carriers—Granting Exclusive Right to Transfer Company—Ordinance Prohibiting—Validity—"Public Utility."

6. City of Portland Ordinance No. 29,773, Section 3, prohibiting railway companies from granting exclusive privileges to transfer companies, is invalid, not being warranted or expressly authorized by City of Portland Charter, Article IV, Section 73 (Sp. Laws 1903, p. 26, as amended), empowering council to exercise police powers "to the same extent as the State of Oregon," and Sections 153 and 154, giving the council "general supervision and power of regulation of all public utilities within the City of Portland and of all persons and corporations engaged in the operation thereof"; the term "public utility" being "deemed to include every plant, property, or system engaged in the public service within the city or operated as a public utility as such terms are commonly understood."

Carriers—Granting Exclusive Rights to Transfer Company—Subject to Exercise of Police Power.

7. The advantage gained by granting exclusive privileges to a transfer company to solicit passenger's baggage is subordinate to a reasonable exercise of police power under which ordinances may be passed in the interest of the traveling public.

Constitutional Law—State Constitution—Limitation of Power.

8. A state Constitution is a limitation and not a grant of power.

Municipal Corporations—Charter—Grant of Power.

9. A municipal charter is a grant and not a limitation of power, hence authority to enact an ordinance must be found in the charter expressly or by necessary implication.

From Multnomah: WILLIAM N. GATENS, Judge.

In Banc. Statement by MR. JUSTICE MOORE.

This is a suit by the Baggage and Omnibus Transfer Company, a corporation, against the City of Portland, a municipal corporation, and its directing executive officers, to enjoin the threatened enforcement of a city ordinance. The complaint alleges in effect that the Northern Pacific Terminal Company, a corporation, owns in that city a union depot and railroad tracks connecting with similar lines of other railway companies; that on January 1, 1914, the terminal company entered into a written contract with the plaintiff granting to the latter the exclusive privilege of requesting from passengers on incoming trains the right to transfer their baggage to such places in Portland, Oregon, as might be directed, and also to maintain within the station grounds a representative to solicit from travelers as they left sleeping-cars after occupying them all or a part of the night the same right; that the plaintiff was also granted the advantage of occupying at the depot a part of the baggage-room and was furnished by the terminal company with telephone connections; that the council of the City of Portland adopted, and its mayor approved, ordinance No. 29,773, Section 3 of which undertakes to make it unlawful for any railway company to give to the owner of any vehicle a right or privilege which would not be extended upon equal terms to the proprietor of all carriages in that municipality, and provides a penalty for a violation of the enactment; and that the defendants threaten to enforce the provisions of such ordinance and to subject the plaintiff and its agents to a multiplicity of suits and criminal actions, thereby depriving it of a valuable property right, to its irreparable injury and damage, to redress which wrong

no adequate remedy exists at law. Copies of the contract and of the ordinance were made parts of the complaint, the prayer of which is that the enactment may be decreed oppressive and void, and the defendants enjoined from putting their menace into execution. The answer admits some of the averments of the complaint, denies others, and alleges generally that the contract referred to is void in that it violates public policy by denying to all others than the plaintiff equal rights and privileges; that it is impossible for any other person engaged in the transfer business to obtain possession of baggage at the depot until several hours after the arrival of a train, thereby making it necessary for all passengers who desire the immediate delivery of their trunks, etc., to patronize the plaintiff, whose contract creates a monopoly. A demurrer to the answer on the ground that it did not state facts sufficient to constitute a defense was sustained, and the relief prayed for in the complaint was granted, from which decree the defendants appeal.

Submitted on brief under the proviso of Supreme Court Rule 18: 56 Or. 622 (117 Pac. xi).

AFFIRMED. REHEARING DENIED.

For appellants there was a brief over the names of *Mr. Walter P. La Roche,* City Attorney, and *Mr. Lyman E. Latourette,* Deputy City Attorney.

For respondent there was a brief over the names of *Messrs. Stapleton & Conley* and *Mr. M. E. Crumpacker.*

MR. JUSTICE MOORE delivered the opinion of the court.

1. It is contended that the contract in question is void for the reason stated, and this being so an error

was committed in granting the relief awarded. As to the validity of such agreements the decisions of courts of last resort are not harmonious. Most of such final determinations relate to the analogous question of the granting by a railway company to a hack driver of a privilege to occupy some favored part of depot grounds so that an advantage is secured in the solicitation of passengers and baggage. In *Old Colony R. Co.* v. *Tripp*, 147 Mass. 35 (17 N. E. 89, 9 Am. St. Rep. 661), which is a leading case on the subject, it was held that a railroad company might contract with a firm to furnish the means to carry incoming passengers and their baggage from its station, and thereby grant the exclusive right to conduct such business, which agreement was not violative of a statute providing that such a corporation "shall give to all persons or companies reasonable and equal terms, facilities, and accommodations * * for the use of its depot and other buildings and grounds." In that case three of the justices dissented, but cited in support of their argument only one American case, that of *New England Express Co.* v. *Maine Central R. R.*, 57 Me. 188 (2 Am. Rep. 31), wherein a different conclusion was reached. In *St. Louis etc. Ry. Co.* v. *Southern Express Co.*, 117 U. S. 1 (29 L. Ed. 791, 6 Sup. Ct. Rep. 542), it was ruled that railroad companies were not required by usage or the principles of the common law to transport the goods of independent express companies over their lines in the manner in which such commerce was usually carried, nor were they, in the absence of a statute commanding it, required to furnish to all independent express companies equal facilities for doing an express business on their passenger trains. It will thus be seen that by a decision of the highest court in the land the principles of the common

law and the rules of general usage have been eliminated from the duty of a common carrier which is not obliged to transport goods of or to furnish equal facilities to express companies unless so demanded by statute: 6 Cyc. 374; 4 R. C. L. 593.

Since the decision was rendered in *Old Colony R. Co.* v. *Tripp,* 147 Mass. 35 (17 N. E. 89, 9 Am. St. Rep. 661), a diversity of judicial utterance is to be found in the opinions of American courts as to the application of the rule so adopted by the majority of the court and the doctrine thus asserted by the minority. In *Oregon Short Line R. Co.* v. *Davidson,* 33 Utah, 370 (94 Pac. 10, 14 Ann. Cas. 490, 16 L. R. A. (N. S.) 777), many of the cases are cited which support and those which deny the principle that a railway company may grant an exclusive privilege to one and refuse it to another who goes upon a common carrier's premises for the sole purpose of soliciting custom or of obtaining business. In that case, in construing a section of the constitution of Utah, which provided that "all railroad and other transportation companies are declared to be common carriers, and subject to legislative control, and such corporations shall receive and transport each other's passengers and freight without discrimination or unnecessary delay," it was held that the clause of the organic law referred to required only that transportation companies should not show favoritism to their own passengers or shippers over the passengers and freight coming from other lines, and did not prohibit a carrier from protecting its passengers from annoyance and interference by others who might desire to solicit the business and patronage of such travelers, or prevent the carrier from providing means by which a passenger might make arrangements for the transportation of himself or his prop-

erty beyond the end of the carrier's railroad. In deciding that case it was determined that the doctrine announced in *New England Express Co.* v. *Maine Central R. R.*, 57 Me. 188 (2 Am. Rep. 31), which it will be borne in mind was cited by the minority of the court in *Old Colony R. Co.* v. *Tripp*, 147 Mass. 35 (17 N. E. 89, 9 Am. St. Rep. 661), as sustaining their theory, had been exploded by the supreme court of the United States in the *Express Cases*, 117 U. S. 1 (29 L. Ed. 791, 6 Sup. Ct. Rep. 542), where the true distinction was pointed out with regard to persons who wished to be carried as passengers or shippers of freight, and such as desired to be transported for the purpose of carrying on an independent business with the public upon the property or trains of a common carrier. To the same effect see the case of *Union Depot & Ry. Co.* v. *Meeking*, 42 Colo. 95 (94 Pac. 16, 126 Am. St. Rep. 145). In addition to the cases cited in *Oregon Short Line R. Co.* v. *Davidson*, 35 Utah, 10 (14 Ann. Cas. 490, 16 L. R. A. (N. S.) 777), in support of the conclusion there reached see also: *New York etc. R. Co.* v. *Scovill*, 71 Conn. 136 (41 Atl. 246, 71 Am. St. Rep. 159, 42 L. R. A. 157); *Godbout* v. *St. Paul Union Depot Co.*, 79 Minn. 188 (81 N. W. 835, 47 L. R. A. 532); *State ex rel.* v. *Union Depot Co.*, 71 Ohio St. 379 (73 N. E. 633, 2 Ann. Cas. 186, 68 L. R. A. 792); *Lewis* v. *Weatherford etc. R. Co.*, 36 Tex. Civ. App. 48 (81 S. W. 111). In reaching a like determination in *Donovan* v. *Pennsylvania Co.*, 199 U. S. 279, 299 (50 L. Ed. 192, 26 Sup. Ct. Rep. 91), Mr. Justice Harlam, says:

"There are cases to the contrary, but in our opinion the better view, the one sustained by the clear weight of authority and by sound reason and public policy, is that which we have expressed."

2. The decision in *Hedding* v. *Gallagher*, 69 N. H. 650 (45 Atl. 96, 76 Am. St. Rep. 204), cited and relied upon by defendants' counsel as sustaining a contrary conclusion was expressly overruled upon rehearing (72 N. H. 377, 57 Atl. 225, 64 L. R. A. 811). We are satisfied that the contract made by the Northern Pacific Terminal Company with the plaintiff is valid unless the agreement has been rendered nugatory by proper enactment. The organic law of the state, which defendants' counsel assert establishes such fact, contains a provision as follows:

"No law shall be passed granting to any citizen or class of citizens, privileges or immunities which, upon the same terms, shall not equally belong to all citizens": Article I, § 20 of the Constitution.

As this clause inhibits only the enactment of a law, it does not prohibit or regulate the right to contract in respect to any subject.

3–5. It is also maintained by defendants' counsel that the following provision of the statute is controlling:

"If any railroad shall make or give any undue or unreasonable preference or advantage to any particular person, firm, or corporation, or shall subject any particular person, firm, or corporation, or particular description of traffic to any undue or unreasonable prejudice or disadvantage in any respect whatsoever, such railroad shall be deemed guilty of unjust discrimination, which is hereby prohibited and declared unlawful; *provided*, this section shall not prohibit any railroad from giving necessary preference to live stock and perishable freight over other freight": Section 6927, L. O. L.

This clause is Section 49 of the act of February 18, 1907, creating a railroad commission: Laws Or. 1907, p. 67, Chap. 53. A careful reading of the entire stat-

ute will disclose the legislative intent was to prohibit a railroad company from showing preference to any of its passengers or shippers. If the act inhibited railway companies from making contracts with hackmen for the transportation of such baggage as they could secure by interviewing passengers on incoming trains, where equal privileges are offered to all that seek to engage such services, the statute would necessarily apply to any other servant whom a common carrier might desire to employ. Passenger trains are usually operated so as safely to afford rapid transportation, and as they carry baggage it is essential that the trunks, valises, etc., should be segregated from the pile in the car used for that purpose before it arrives at the station where such personal effects are to be put off, so that no unreasonable delay may result. Railway companies are held responsible as common carriers for the loss of or damage to baggage while being transported and this liability continues for a reasonable time after such trunks, etc., have been placed in their depots for delivery. In order to protect railway companies it is essential that their employees and the persons with whom they make indemnity contracts for that purpose should alone be permitted to enter their baggage cars and rooms kept for storing such personal effects. It is to the advantage of railroad companies and also to the benefit of the traveling public that baggage when thus stored should be delivered as soon as possible, so that liability therefor might cease, the room kept as empty as practicable, and that the owner might speedily secure possession of his personal effects. Such companies ought, therefore, to be allowed freely to contract with any responsible person, firm, or corporation for the performance of that service, and there is noth-

ing in the statute prohibiting it. For that purpose it is competent for railways to make reasonable by-laws regulating the use of its stations and other matters concerning the dispatch of its business. (2 Redfield, Railways, § 200.)

6. The validity of Section 3 of ordinance No. 29,773, of which mention has been made, must, therefore, depend upon the power which the council of the City of Portland can legally exercise. Subdivision 1 of Section 73 of Article IV of the charter of that municipality, enacted January 23, 1903, and now remaining in force, reads:

"The council has power and authority, subject to the provisions, limitations, and restrictions in this charter contained, to exercise within the limits of the city of Portland all the powers, commonly known as the police power, to the same extent as the state of Oregon has or could exercise said power within said limits": Special Laws Or. 1903, p. 26.

Clauses of the organic law of that municipality amended May 3, 1913, by an exercise of the initiative power, provide as follows:

"The term 'public utility' as used in this charter shall be deemed to include every plant, property, or system engaged in the public service within the city or operated as a public utility as such terms are commonly understood": Section 153, Chapter VII.

"The council shall have general supervision and power of regulation of all public utilities within the city of Portland, and of all persons and corporations engaged in the operation thereof": Id., Section 154.

It is maintained by defendants' counsel that founded upon the provisions last quoted Section 3 of ordinance No. 29,773 is a valid exercise of the police power, delegated to the council of the City of Portland, thereby making the municipal enactment referred to equiv-

alent to a statute regulating the business in which the plaintiff is engaged, and this being so an error was committed in sustaining the demurrer to the answer. The cases relied upon as sustaining the legal principle contended for will be reviewed. Thus in *Lindsay* v. *Mayor etc. of Anniston,* 104 Ala. 257 (16 South. 545, 53 Am. St. Rep. 44, 27 L. R. A. 436), it was held that though a hackman might under a contract with a railroad company owning a city depot have the right and privilege to enter the premises to solicit patronage, an ordinance subsequently enacted prohibiting hackmen from going within such depot to solicit patronage was not unconstitutional and void as impairing the obligation of a contract because the agreement should be deemed to have been entered into subject to the power of the city to regulate hacks. In *City of Chillicothe* v. *Brown,* 38 Mo. App. 609, it was ruled that an ordinance regulating the conduct of hackmen, porters, etc., in the pursuit of their business, and forbidding the solicitation of custom at the depot or platform of any railroad within the corporate limits of the city, was reasonable and valid, and that it constituted no defense to an action by the city for a violation of the ordinance that the superintendent of the railway at whose depot the offense was committed had drawn a line on the platforms thereof and told the defendant and others they might stand on the walk up to such mark and solicit travelers for their hotels, etc., as the railroad company had no authority to suspend at its depot the operation of the municipal enactment. In *City Cab etc. Co.* v. *Hayden,* 73 Wash. 24 (131 Pac. 472, Ann. Cas. 1914D, 731, L. R. A. 1915F, p. 726), it was determined that an ordinance prescribing rules for the regulation of hackmen at a depot-stand was not unreasonable in that certain vehicles were assigned to

specified positions, some of which were of much more value than others, if such spaces were reasonable so far as the rights of the public were concerned. In *City of Colorado Springs* v. *Smith*, 19 Colo. 554 (36 Pac. 540), an ordinance providing that hotel runners, hackmen, etc., plying their respective vocations at any railway passenger depot, on the arrival and departure of trains should occupy no part of the depot grounds or premises except that portion allotted to them by the station agent, and it was decided that such enactment should not be construed as giving a railroad company the right to exclude from the depot grounds any person lawfully engaged in serving the traveling public, either with or without vehicles, nor to confer upon such company the power to grant exclusive rights and privileges to persons engaged in such occupations, but that the ordinance being authorized by statute was to be upheld as a reasonable regulation to promote the convenience of the traveling public and to prevent disorder at railway stations.

7–9. A careful examination of these cases will disclose that the several ordinances referred to were enacted under express delegation of legislative authority to regulate at railway stations the business and conduct of hackmen; that though one of them may have entered into a contract with a railroad company for the exclusive privilege of soliciting patronage at its depot, the advantage thus obtained was held subject to the paramount right of a reasonable exercise of the police power, which authority to enact wholesome ordinances might be employed, not for the benefit of the railway company or its favorite hackman, but in the interest of the traveling public. The legal principle thus declared is acknowledged as controlling, but it has no application to the facts involved in the

case at bar, for here Section 3 of the ordinance in question does not attempt to regulate the conduct or business of hackmen, or to legislate in the interest or for the benefit of the traveling public, but the municipal enactment is designed to inhibit the making of valid contracts by railway companies so that the benefits derived from a grant of the exclusive privilege to solicit a transfer of baggage which the plaintiff enjoys under its agreement, may be divided among the owners of vehicles who are engaged in the same business and are able to secure a share of the patronage. Such Utopian state of society is occasionally brought into existence by the acknowledgment, voluntary or otherwise, of the interested parties, but legislation designed to effectuate such felicitous conditions savors of paternalism and would seem to be premillennial. Whether under a state Constitution, which is a limitation and not a grant of power, a statute can be validly enacted and legally enforced, whereby equality of burden and remuneration may be secured, is not now involved. In a municipal charter, however, which is a grant, and not a limitation of power, the authority to enact such a provision as Section 3 of ordinance No. 29,773 must be found in the charter in express language or arise by necessary implication. The organic law of the City of Portland, to which reference has been made, does not explicitly or inferentially contain such a grant of power, and for that reason the section of the enactment mentioned is void.

It follows that the decree should be affirmed, and it is so ordered. AFFIRMED. REHEARING DENIED.

Argued April 6, affirmed April 24, rehearing denied May 29, 1917.

JOHNSON *v.* PACIFIC LAND CO.

(164 Pac. 564.)

Fixtures—Removal of Fixtures—Recovery by Mortgagee.

1. A mortgagee, whose mortgage is not due, but who is in lawful possession, to recover fixtures from one who has removed them, need not show the security is not ample, or will become so.

Fixtures—Subjection to Mortgage.

2. Fixtures attached by the owner of realty, though after the giving of a mortgage, become subject to the mortgage.

Fixtures—Water System.

3. Articles which enhance the comfort of a home, such as parts of a water system, are as a rule considered fixtures, when attached in the usual manner.

Fixtures—Tests in Determination.

4. In determining whether an article used in connection with realty is a fixture, the general tests are annexation, adaptation to use, where and as annexed, and intention to make the annexation permanent, this intention being inferred from the nature of the article, the relation of the party annexing, the policy of the law in relation thereto, the structure and mode of annexation, and the purpose and use for which it is made; the first two tests, of which the second is entitled to the greater weight, being part of and evidence of the third.

[As to tests for determining what are fixtures, see note in 105 **Am. St. Rep.** 646.

From Hood River: WILLIAM L. BRADSHAW, Judge.

Action by John R. Johnson against the Pacific Land Company. From a judgment for plaintiff, defendant appeals. Affirmed.

Department 2. Statement by MR. JUSTICE BEAN.

This is an action for the possession of personal property. The cause was tried before a jury and a verdict rendered in favor of plaintiff. From a consequent judgment defendant appeals.

In 1911 plaintiff was the owner of certain real property described in the complaint consisting of a tract of land with a modern dwelling-house valued at $3,500,

and an orchard situated thereon, in Hood River County, Oregon. During that year plaintiff sold the same to one Ricord who executed to him a purchase money mortgage for $10,500. Ricord subsequently conveyed the real property to one Vreeland who in turn sold the same to A. Welch who conveyed to this defendant. In each instance the grantee assumed and agreed to pay the mortgage which is not yet due and has not been foreclosed. In March, 1915, this defendant abandoned the premises and the plaintiff took possession thereof under his mortgage. In 1914, Welch who was then the holder of the record title to the premises installed thereon a water system of which the personal property in question was a part. A well was dug, tiling inserted in it, and a platform laid on the top of the same. A motor and pump were installed for forcing the water through attached pipes to a 295-gallon tank placed on wooden sills on the ground in the basement of the house, and thence through water pipes in the dwelling-house by means of electric power. Early in the spring of 1915, defendant caused the pump, motor and tank to be disconnected from the pipes and removed from the premises. Plaintiff brought this action claiming a special ownership in the personal property by virtue of his mortgage.

Defendant denied plaintiff's right and affirmatively alleged that the personal property was owned by A. Welch. It was admitted that plaintiff was in the rightful possession of the property as mortgagee.

AFFIRMED. REHEARING DENIED.

For appellant there was a brief over the names of *Mr. Claude M. Johns* and *Mr. Charles A. Johns,* with an oral argument by *Mr. Claude M. Johns.*

For respondent there was a brief and an oral argument by *Mr. Ernest C. Smith.*

MR. JUSTICE BEAN delivered the opinion of the court.

1. The question for determination is whether the water system installed on the premises became a part of the realty. It was the contention of the defendant that a mortgagee in possession suing for damages on account of the removal of fixtures must show the impairment of his security; and that the complaint is insufficient in this respect. However, a mortgagee left in possession of real property for the purpose of preserving the security and holding it together until it shall be applied to the indebtedness, who is not foreclosing and whose mortgage is not yet due, need not show that his security is or will not be ample at some distant date before he can take and replace fixtures which were a part of the realty subject to a lien of the mortgage. It is only reasonable that the plaintiff has the right to do anything necessary to keep his security intact. The value of these premises and the adequacy of the security is not a fixed quantity but is something which fluctuates with market values. It would be impossible to say that the security will or will not be adequate at some distant date when the mortgage comes due and is foreclosed: *Caro* v. *Wollenberg,* 68 Or. 420 (136 Pac. 866); *Buck* v. *Payne,* 52 Miss. 271, 279; 27 Cyc. 1248; 34 Cyc. 1390. As stated in 20 Am. & Eng. Enc. of Law, p. 1016, where the mortgagee is in possession lawfully, or though not in possession has the right to possession, he may bring an action of trespass as though the title were vested in him unconditionally: 1 Jones on Mortgages (4 ed.), § 707; *Jersey City* v. *Kiernan,* 50 N. J. L. 246, 252 (13 Atl. 170).

At the close of the testimony counsel for defendant requested the court to direct a verdict in its favor. There was evidence tending to show, first, that the water system was permanently annexed to the realty; second, that it was especially adapted to the purpose of the property as a residence to which it was attached, and was connected with a view to the purposes for which the realty is naturally and usually employed; and third, that from the nature of the water system affixed, the relation and situation of the owner making the annexation, the whole situation and mode of the connection, the purpose for which the annexation was evidently made, and taking into consideration all the facts and circumstances disclosed by the testimony, the jury could fairly infer that the party making the annexation did so with a view to making the water system a part of the real property. There was nothing to indicate that the system was adjusted for a temporary purpose. There was, therefore, no error in the refusal of the trial court to direct the jury to find a verdict in favor of defendant.

The trial court fully explained the issues raised by the pleadings and over the objections and exceptions of counsel for defendant charged the jury as follows:

"Plaintiff claims said personal property because it became a fixture to and a part of the land covered by his mortgage. You are instructed that a fixture is any article or thing which was personal property, but which by being physically annexed or affixed to real property, becomes accessory to the real property and a part and parcel of it. Personal property may therefore be thus transformed into real property."

"When personal property is attached in a permanent manner to real property and adapted to be used with that part of the real property to which it is attached, then it becomes a fixture and a part of the real estate, a part of the land itself."

"In using the term 'permanently attached' in this contention, it is not meant that the personal property shall be so attached as to make its removal impossible or even difficult, but any personal property which is placed upon and attached to real property, which is used as a part of the real property, and which is suitable for and adapted to such a continued use, in such a position and manner, then it is regarded by the law as being permanently attached."

"Articles of personal property annexed by the owner to land which is subject to a mortgage, becomes subject to the mortgage and cannot be removed without the consent of the holder of the mortgage. This is true whether such annexation was before or after the execution of the mortgage."

Counsel for defendant also asked the court to charge the jury that the intention of the party placing machinery in a building is the sole criterion as to whether it becomes a permanent fixture and a part of the realty, and thus bring it under the mortgage lien; and that the permanency of the installation of such machinery was not to be considered.

2, 3. A fixture is an article or thing which was personal property but which, by being physically annexed or affixed to real property, becomes accessory to the real property and part and parcel of it: 13 Am. & Eng. Enc. Law, 596. Fixtures attached by an owner to land subject to a mortgage come under the lien of the mortgage and cannot be removed without the consent of the mortgagee. This is true whether annexation was before or after the execution of the mortgage: 13 Am. & Eng. Enc. Law, 670, and notes; 19 Cyc. 1061E; 1 Jones on Mortgages (4 ed.), § 436. Articles which enhance the comfort of a home such as water-pipes, water-tanks, cisterns, etc., are as a rule considered fixtures when attached in the usual manner: 19 Cyc. 1062; 13 Am. & Eng. Enc. Law, 666; *Cole* v. *Roach,* 37 Tex.

413; *Blethen* v. *Towle,* 40 Me. 310; *Philbrick* v. *Ewing,* 97 Mass. 133.

4. In determining the question of whether an article used in connection with realty is to be considered a fixture the general tests are, first, the annexation to the realty, second, adaptation to use, where, and as annexed, and third, the intention to make the annexation permanent, this intention being inferred from the nature of the article, the relation of the party annexing, the policy of the law in relation thereto, the structure and mode of annexation, and the purpose and use for which it is made: *Helm* v. *Gilroy,* 20 Or. 517 (26 Pac. 851); *Bay City Land Co.* v. *Craig,* 72 Or. 44 (143 Pac. 911); 19 Cyc. 1039. The application of these tests does not establish definite criteria, but leaves each case to be determined not only by the circumstances and nature of the annexation and the uses to which the property is put, but also on the relations of the parties.

The first of the tests—that is, annexation to the realty, either actual or constructive, is generally held to be uncertain and unsatisfactory, the tendency being to accord less and less significance thereto. There must of course be actual or constructive annexation, but regard must be had to the object, the effect, and the mode of annexation, and physical annexation is not alone sufficient. The extent and mode of actual annexation have but little weight except in so far as it relates to the nature of the article itself, the use to which the same is applied, and other circumstances as indicating the intention of the party making the annexation. But it is usually conclusive that a chattel has become part of the realty when it has been so affixed as to be incapable of severance without injury to the freehold: 11 R. C. L., pp. 1059, et seq.

The second test, to wit, adaptation or application to the use or purpose of that part of the property with which it is connected, is generally considered as entitled to much weight, especially in connection with the criterion of intention. The tendency is to regard everything as a fixture which has been attached to realty with a view to the purposes for which the realty is held or employed, however slight or temporary the connection between them: R. C. L., § 5, pp. 1061, 1062.

The third test, the intention of the party making the annexation, has been said by some of the authorities to be a controlling consideration, and generally it is held to be the chief test. To have this effect, the intention to make an article a permanent accession to the realty must affirmatively and plainly appear. The test of intention is to be given a broad and comprehensive signification. It does not merely imply the secret action of the mind of the owner of the property, nor need it be expressed in words. It is to be inferred from the nature of the article affixed, the relation and situation of the party making the annexation, the structure and mode of annexation, and the purpose or use for which the annexation has been made; which, obviously, suggests that the other tests are really part of this comprehensive test of intention, and that they derive their chief value as conspicuous evidence of such intention: 11 R. C. L., p. 1062, § 6. The controlling intention * * is the intention which the law deduces from all of the circumstances of the annexation: 19 Cyc. 1046.

As we understand the instructions of the trial court, while not using the exact language adopted by the text-writers, the substance of the law was given to the jury in the charge. The jury passed upon the facts. It was not a very violent conclusion for the jury to find that

the removal of a large part of the water system, namely, the motor, pump and tank from the heart thereof, which system connected a well with the dwelling-house for the convenience of the occupant of the house, was an injury to the freehold.

Counsel for defendant argues that the chattel was not injured by the removal. That may be true, but how about the real estate that was left behind? The jury found that that was denuded and injured.

The question in the present case is between the mortgagor and mortgagee and the rules which apply when there are intervening equities of third parties such as attaching creditors and subsequent chattel mortgagees, need not be considered. The question is a mixed one of law and fact and was fairly submitted to and determined by the jury. Finding no error in the record the judgment of the Circuit Court is affirmed.

AFFIRMED. REHEARING DENIED.

MR. CHIEF JUSTICE MCBRIDE, MR. JUSTICE MOORE and MR. JUSTICE MCCAMANT concur.

Argued April 6, reversed April 24, rehearing denied May 29, 1917.

BLAKNEY *v.* ROWELL.

(164 Pac. 709.)

Exchange of Property—Evidence—Sufficiency.

1. In a suit to rescind an exchange of property, including the assignment by defendants to plaintiffs of the lease of an apartment house, evidence *held* to show that the defendants in operating the apartment house received on an average of $150 a month over all expenses during the time they occupied the premises, so that their representation to that effect was not false.

Exchange of Property—Warranty.

2. A representation that defendants in operating the apartment house had received on an average of $150 over all expenses during

the time they occupied the premises was not a guaranty that the net income which the plaintiffs would receive in operating the apartment house would be $150 a month, or any other sum.

Exchange of Property—Warranty.

3. If defendants, who, pursuant to an agreement for the exchange of property, assigned their lease of an apartment house to the plaintiffs, warranted that plaintiffs would receive a net gain of $150 a month if they kept the rooms well filled, defendants were not liable for the loss resulting from plaintiffs' inability to keep the rooms well filled.

[As to damages for breach of warranty of title on exchange of land, see note in 24 Am. St. Rep. 268.]

From Multnomah: ROBERT G. MORROW, Judge.

Department 2. Statement by MR. JUSTICE MOORE.

This is a suit to set aside a bill of sale, to cancel a promissory note and a chattel mortgage, and to recover the consideration given for personal property and the assignment of a lease. The defendant, Mary C. Rowell, and her husband W. W. Rowell, now deceased, on December 27, 1913, assigned to the plaintiffs, Earl A. Blakney and Lena M. Blakney, his wife, a lease of a house in Portland, Oregon, known as the "Nordica Apartments," having fifty rooms, and also transferred to them all the furniture, etc., therein for the expressed consideration of $4,000, for which plaintiffs executed to Mr. Rowell a deed for five acres of land in Washington County, Oregon, valued at $1,250, and gave to Mr. and Mrs. Rowell their promissory note for $2,500, secured by a chattel mortgage of such personal property, which household goods were accepted subject to a prior mortgage of $250, the payment of which the plaintiffs assumed. They took possession of the house December 29, 1913, and on the 9th of the next month paid on their note $500, and later $106.65 on the prior mortgage. This suit was commenced January 28, 1915, and four days thereafter the plaintiffs abandoned

the premises, whereupon Mrs. Rowell took possession and subsequently foreclosed the larger chattel mortgage, purchasing the goods at a public sale thereof February 15, 1915, for $1,750, and indorsing that sum on the plaintiffs' promissory note. The complaint charges that the assignment of the lease and the transfer of the personal property were brought about by the knowingly false and fraudulent representations of Mr. and Mrs. Rowell, particularly specifying them, which statements the plaintiffs believed, and relying thereon were deceived to their damage.

The answer denied the charge, and for a further defense averred that prior to purchasing the property the plaintiffs carefully inspected the furniture, considered the extent of the business, and relied upon their own judgment as to the value thereof.

The reply controverted the allegations of new matter in the answer, and the cause being tried resulted in a decree permitting the defendants to keep, as compensation for the use of the property, the money which had been paid, requiring them to reconvey the five-acre tract mentioned, and also to cancel and surrender the promissory note and chattel mortgage; and they appeal. REVERSED. SUIT DISMISSED.

REHEARING DENIED.

For appellants there was a brief over the names of *Mr. Albert H. Tanner* and *Mr. John Van Zante,* with an oral argument by *Mr. Tanner.*

For respondents there was a brief over the names of *Mr. Barnett H. Goldstein* and *Messrs. Joseph & Haney,* with an oral argument by *Mr. Goldstein.*

MR. JUSTICE MOORE delivered the opinion of the court.

The testimony given at the trial shows that prior to December 27, 1913, the plaintiffs were living in the vicinity of the "Nordica Apartments," and having a general knowledge of its patronage they, desiring to secure the house and furniture, sought an interview with Mrs. Rowell, who informed them that during the preceding year the income from the rooms had been $150 a month in excess of all the expenses, and the plaintiffs were assured that if they purchased the property they would have no difficulty in obtaining a like monthly sum, if the rooms were kept well occupied. Mrs. Rowell also stated to the plaintiffs that she was then paying for the use of the house $200 a month, but at her request the landlord would reduce the rent $25 a month. Mr. and Mrs. Rowell represented to the plaintiffs that their only reason for assigning the lease and selling the furniture, etc., was a desire to remove to the state of Idaho, where they owned irrigated land which required immediate attention, even if they were obliged to dispose of the rooming-house and its furnishings at a loss. After the sale was consummated neither Mr. Rowell nor his wife went to Idaho, and the evidence discloses that when they transferred the property they were paying only $150 a month rent, though the lease demanded a greater sum, and that no difficulty was encountered in obtaining for the plaintiffs the use of the premises at $175 a month. The plaintiffs, in January, 1914, collected from tenants, $426.70, while the operating expenses during that time were $435.95. They made complaint about such loss to Mr. and Mrs. Rowell, who informed them that the expenses during the spring and summer would not be so great owing to less consumption of fuel and the electric lights

would be used for a shorter time, and that the average profit to be derived from conducting the business should be based on the yearly receipts and disbursements. The collections for the next two months were $504.15 and $438, respectively, while the disbursements for that time were $480.35 and $455.95. In April, 1914, the plaintiffs took in only $293.80, and paid out $292.65. The greatest sum thereafter obtained during any month they occupied the premises was $254.50, while the monthly expenses were not diminished in proportion to the receipts. Mr. Blakney testified that they paid as rent $175 a month for January, February, and March, 1914, $150 a month for the next quarter, and $125 a month for the remainder of the time; that he was generally employed in other business, for which service he received a monthly salary of $60; that his wife collected as the monthly rent of her property $20, which sums were employed in liquidating the expenses of the apartment house; and that during the time they occupied it they made a net profit of $29.

Mrs. Rowell testified that she and her husband purchased the household goods in and took possession of the "Nordica Apartments" March 23, 1911, agreeing to pay therefor $4,500; that they conducted the rooming-house until December 29, 1913, when they turned it over to the plaintiff; that during the 33 months and 6 days in which they were engaged in that business they made a net profit therefrom of $5,000, or a monthly average gain of $150; that they kept no books, but of the sum of money so received they paid off an indebtedness of $3,000, expended on their Idaho lands $1,108.74, discharged taxes in that state and in Oregon and street assessments in Portland in the latter state, amounting to $562.67, and also paid for wearing apparel, fraternal insurance, and other obligations. Mrs. Rowell

further testified that when they disposed of the apartment house they expected to remove to Idaho, but later altered their plans and rented a farm in the Willamette Valley. She also stated upon oath that though they were paying only $150 a month rent when the furniture was sold to the plaintiffs, the lease demanded a greater sum, and the remainder was to have been paid when the business of the apartment house improved. In this particular she is corroborated by the testimony of the landlord's agent who collected the rent.

The testimony of several real estate brokers, who were engaged in negotiating sales and exchanges of rooming-houses and their contents, is to the effect that during the year 1913, Mr. Rowell listed with them for sale or exchange an assignment of the lease of the "Nordica Apartments" and a transfer of the furnishings therein at valuations much less than the purchase price received from the plaintiffs, such owner then saying to each agent that the business in which he and his wife were engaged did not pay.

Other witnesses impute to Mr. and Mrs. Rowell remarks which it is asserted they made about the plaintiffs, such as: "They could not succeed in operating the lodging-house unless they had other income"; "they could not expect to hold possession of the property very long and would be obliged to give it up when the chattel mortgage was foreclosed"; and in referring to the purchasers of the goods and to the price which they paid: "The suckers are not all dead yet." Mrs. Rowell denied the comments attributed to her, but her husband having died the expressions ascribed to him were unchallenged. She, at plaintiff's request, tried for some time to secure for them a purchaser of the personal property, but was unable to do so. It was asserted by a witness that Mrs. Rowell directed Mrs.

Blakney to say to persons visiting the apartment house with a view of inquiring about or buying the furniture therein that the business was prosperous.

1, 2. The evidence shows that when all the rooms in the "Nordica Apartments" were filled, $461 a month could be realized from the regular occupants if they paid the sums demanded, and that from $6 to $12 were usually received from transient customers. It is believed the evidence clearly establishes the fact that Mr. and Mrs. Rowell, in operating the apartment house, received on an average $150 a month over all expenses during the time they occupied the premises, so that their representation to that effect was not false. It is quite probable, however, that for a part of the year 1913 the business was not conducted at a great profit, which fact seems fairly inferable from the reduction in the rent of $50 a month, which was granted by the landlord. We have not been able to find, from a careful examination of the testimony, any guaranty given by Mr. or Mrs. Rowell that the net income which the plaintiffs would receive should be $150 a month or any other sum.

In the case at bar the representations made by Mrs. Rowell to the plaintiffs were to the effect that if they could keep the apartment house well filled with tenants, $150 a month could be made in excess of the expenses. Mr. Blakney, referring to the representations made by Mr. Rowell, testified as follows:

"He said they always made money.

"Q. He did not say they made $150 or any definite amount?

"A. No."

The first three months the plaintiffs conducted the business their average receipts were about equal to the sums which they were assured could be obtained.

Their expenses, however, were probably much greater than had been incurred by their predecessors. Mr. and Mrs. Blakney were inexperienced in that occupation, and made many repairs to the rooms, putting in some of them new rugs and many other furnishings. Her tenants evidently received better treatment than they had been getting, for one of them, referring to Mrs. Rowell, testified:

"We never had any hot water, and never had any heat; that was, to amount to anything."

3. It is believed that by careful management of the apartment house for the first three months after the plaintiffs took possession a net profit could have been realized from the business equal to that represented. In April, 1914, and thereafter, owing to the great financial depression then prevailing on the Pacific Coast, many tenants in the "Nordica Apartments" left the premises to obtain less expensive quarters, and it was impossible to keep the rooms well filled or to conduct the business at a profit. The assurance of a monthly net gain of $150, if the representation be regarded as a warranty, was made to depend upon the plaintiffs' ability to keep the rooms well filled. The failure in this respect is not chargeable to the defendants, who are not liable for the resulting loss: *Black* v. *Irvin,* 76 Or. 561 (149 Pac. 540).

As sustaining the decree rendered herein the plaintiffs' counsel cite the case of *Koehler* v. *Dennison,* 72 Or. 362 (143 Pac. 653), where it was held that Hull, one of the defendants, who was the plaintiff's agent in securing for his principal a place of business, conspired with Dennison, the other defendant, and represented to the plaintiff that he could obtain from the landlord a lease of the premises, and that such confidential relation having existed between the plaintiff

and Hull, and the latter's confederacy with Dennison in consummating the sale of a barber-shop, rendered them liable to the plaintiff for the loss which he sustained by reason of his failure to secure a lease for more than a month. The statements made by the defendants to the plaintiff of the sums of money which he could daily make by conducting the business, though referred to in the majority opinion, were not considered as anything more than the mere expression of an opinion relating to uncertain future gains and not amounting to a warranty. The decision in that case is not controlling herein: See upon this subject *Hedin* v. *Minneapolis etc. Institute,* 62 Minn. 146 (64 N. W. 158, 54 Am. St. Rep. 628, 35 L. R. A. 417, and notes).

The decree is, therefore, reversed and the suit dismissed. REVERSED. SUIT DISMISSED.

REHEARING DENIED.

MR. CHIEF JUSTICE MCBRIDE, MR. JUSTICE BEAN and MR. JUSTICE MCCAMANT concur.

Argued May 1, dismissed 15, rehearing denied May 29, 1917.

STATE ex INF. v. BOZORTH.

(164 Pac. 958.)

Municipal Corporations — Enactment of Charter — Initiative and Referendum.

1. The Bay City city council having previously adopted an ordinance providing for exercise of the initiative and referendum powers reserved to the voters under the Constitution, and in pursuance thereof having in the absence of one of its members unanimously adopted an ordinance referring to the voters charter amendments and calling a special election for adoption or rejection, due notice of which was given by posting, publication, and distribution to each voter of a copy of the measure, the proposed new charter, on receiving a majority vote and being proclaimed duly ratified by mayor, became the fundamental law of the city.

[As to construction of initiative or referendum provision in municipal charter, see note in Ann. Cas. 1916B, 319.]

Original proceedings by *quo warranto* in Supreme Court.

Action instituted in the name of the State of Oregon ex inf. T. H. Goyne, District Attorney, for Tillamook County, Oregon, against John O. Bozorth, J. C. McClure, Theodore Jacoby, W. C. Hawk, George James, J. T. Nevins and Henry Butler, comprising the city officers of Bay City, a municipal corporation. Dismissed.

For the plaintiff there was an oral argument by *Mr. Webster Holmes, amicus curiae.*

For defendants there were oral arguments by *Mr. George P. Winslow* and *Mr. W. A. Johnson.*

In Banc. MR. JUSTICE MOORE delivered the opinion of the court.

This action was instituted in our court in the name of the state upon the relation of the proper district attorney to determine the respective rights of the defendants to act as and discharge the duties of mayor, recorder, and councilmen of Bay City, Oregon, a municipal corporation. The information herein was induced by and predicated upon the decision rendered in the case of *Provoost* v. *Cone,* 83 Or. 522 (162 Pac. 1059), where it was held that ordinance No. 3 of that municipality, adopted October 17, 1910, and ratified at an election held December 20th of that year, purporting to amend and substitute another charter in lieu of the original organic act of the city, was ineffectual for that purpose. The question there involved was the validity of a municipal tax attempted to be levied pursuant to the provisions of the proposed amendment. In that suit the only proceedings of the council that

were or could have been brought up and considered occurred prior to the attempted imposition of the tax. At that time no general provision had been enacted by the council relating to the initiative and referendum, though the time for holding an election thereunder had been prescribed. Subsequently, however, as appears from the answer to the information herein, ordinance No. 107 was adopted and approved, providing for an exercise of the initiative and referendum powers reserved to the legal voters of municipalities under the Constitution of Oregon. A section of that ordinance referring to the attempted amendment of the charter which was considered in the case of *Provoost* v. *Cone*, 83 Or. 522 (162 Pac. 1059), reads:

"Whereas, some question has arisen concerning the regularity, sufficiency, and legality of the adoption of the present charter of Bay City, submitted to the legal voters of said city on the 20th day of December, 1910; and, whereas, an issue of bonds for the purpose of providing public docks for said city has been attempted to be authorized under the provisions thereof; and, whereas, owing to the irregularities and illegalities connected with the passage of the same, it is impossible to sell and dispose of said bonds; and, whereas, the charter of said municipality imposes upon its officials the duty of providing wharves for said city, and for said purpose the city officials have attempted to sell and dispose of bonds therefor, which it has been unable to do owing to the above irregularities and illegalities; and, whereas, it is necessary that a new charter be adopted in the manner provided by law at as early a date as possible and in order proposed so to do it is necessary to enact this ordinance, now, therefore, an emergency is hereby declared to exist and this ordinance shall immediately go into force and effect upon its adoption and approval."

Pursuant to the provisions of that enactment the council on June 2, 1914, in the absence of one member

unanimously adopted a resolution, which was immediately approved by the mayor, referring to the voters of Bay City a new charter, denominated: "Charter Amendments Submitted to the Voters by the Council," which proposed alteration included the attempted amendment of December 20, 1910, and all subsequent alterations thereof, and also contained provisions authorizing the issuance and sale of municipal dock bonds. The resolution though denominated such was in fact an ordinance, enacted in the same form and manner as such legislation, and provided for the publication of ordinance No. 107, containing the new charter as prepared, and calling a special election to be held June 22, 1914, for the purpose of adopting or rejecting the substituted organic law. Due notice thereof was given by publication of the proposed new charter in the city official newspaper, by posting copies thereof in the required public places for the prescribed time, and also by distributing to every voter in the municipality a copy of the measure. The election was held at the time appointed and a majority of all the votes cast thereat having been found to be in favor of the adoption of the new charter it was, on June 26, 1914, by proclamation of the mayor declared to have been duly ratified, since which day the new charter has been acted upon and treated as the fundamental law of the municipality, and each of the defendants holds office pursuant to its provisions.

The answer to the information sets forth copies of the entire proceedings whereby the new charter was undertaken to be substituted for the original organic act and all attempted amendments thereto. It is deemed unnecessary to advert particularly to the form and manner of inaugurating or consummating the ultimate alterations referred to, a careful examination

of which convinces us that under the rules adopted in the cases of *State ex rel.* v. *Kelsey,* 66 Or. 70 (133 Pac. 806), and *Duncan* v. *Dryer,* 71 Or. 548 (143 Pac. 644), the new charter was enacted with all the formalities prescribed by law, thereby regularly amending the original organic act of the municipality and all attempted alterations thereof.

The defendants herein are, therefore, the duly chosen, legally qualified, and acting officers of Bay City, Oregon, under and pursuant to the provisions of its new charter, which went into effect June 26, 1914, when so proclaimed by the mayor, and each defendant is entitled to the respective office so held by him. It follows that this action should be dismissed, and it is so ordered. DISMISSED.

Argued March 21, reversed and remanded April 10, modified on rehearing May 29, 1917.

WARD *v.* JAMES.

(164 Pac. 370; 164 Pac. 372.)

Vendor and Purchaser—Rescission by Purchaser—Tender of Purchase Price.

1. Under an agreement providing for a deed after payment of purchase price, the purchaser cannot rescind for failure to deliver deed where he has not tendered or paid purchase price.

Vendor and Purchaser—Assignment by Purchaser—Status of Vendor.

2. An assignment, or arraignment for an assignment, of a contract for the purchase of land, does not change status of vendor; the assignee standing in no better position than assignor.

Vendor and Purchaser—Strict Foreclosure—Defense—Defective Title.

3. In an action against a purchaser in possession for strict foreclosure of a contract for the sale of land by vendor before the time when he is required to pass title, the purchaser cannot defend on the ground that title is defective, since vendor may acquire title before the specified time.

Vendor and Purchaser—Strict Foreclosure—Defective Title—Estoppel.

4. In such case the vendor and vendee stand in relation of landlord and tenant, and the purchaser, or his assignee, in possession is estopped from denying title of vendor.

Vendor and Purchaser—Strict Foreclosure—Tender of Title—Concurrent Acts.

5. The rule that before vendor can foreclose a sale contract he must tender title according to contract is not applicable, where payment of purchase price is a condition precedent to execution of deed; payment and making conveyance not being concurrent acts.

ON PETITION FOR REHEARING.

Vendor and Purchaser—Rescission by Purchaser—Default in Payment of Interest.

6. Under an agreement providing for a deed after payment of purchase price, the purchaser cannot rescind for defects in vendor's title, where, after allowing purchaser all credits to which he is entitled, he is still in default in payment of interest at the time vendor brings suit to foreclose the contract.

Vendor and Purchaser—Rescission by Vendor—Conditions Precedent.

7. In order to put the vendor in default and claim a rescission of the contract, the purchaser must be ready to pay the entire purchase price, must offer to do so and demand a deed.

Vendor and Purchaser—Rescission—Grounds—Defects in Title.

8. Under a contract providing for a deed after payment of purchase price, payable a long time subsequent to date of contract, a defect in vendor's title does not call for rescission, provided sale is in good faith, and vendor has not by some affirmative act put it out of his power to perform; it being sufficient that he have title when purchaser has a right to a deed.

Vendor and Purchaser—Strict Foreclosure— "Good Commercial Title" —Necessity.

9. Although contract did not require delivery of a good and sufficient deed free from all legal encumbrances until payment of purchase price, vendor must, where he seeks a strict foreclosure, require purchaser to pay within a limited time a large sum of money due on purchase price, or lose his interest in property, be able to furnish a good commercial title, a title such as attorney for purchaser should advise his client to accept.

Vendor and Purchaser—Rescission by Purchaser—Failure to Furnish Abstract—Estoppel.

10. Granting that contract should be reformed, so as to require vendor to furnish an abstract of title, purchaser, who purchased an abstract and made payment on purchase price after vendor's alleged failure, was not entitled to rescind for vendor's failure to furnish an abstract.

From Lane: JAMES W. HAMILTON, Judge.

Suit by George D. Ward against W. F. James, Francis E. James, his wife, George R. Rickman, Ada-

line Rickman and Pennington County Bank, a corporation. From a decree in favor of Francis E. James, plaintiff appealed. Reversed and remanded with directions.

Department 2. Statement by MR. JUSTICE BEAN.

This is a suit to foreclose a contract for the sale of land, sought to be rescinded by the defendants. From a decree in favor of defendant Francis E. James, rescinding the contract and for $3.245.65, partial payments made and damages, plaintiff appeals.

On April 14, 1913, plaintiff George D. Ward and defendant W. F. James entered into a contract for the sale by the former and the purchase by the latter of a farm in Lane County, consisting of 640 acres for $18,000 to be paid in the following manner: Seven thousand dollars upon delivery of the contract and $11,000 on or before ten years from that date, with interest at seven per cent per annum payable annually. Defendant W. F. James was to pay the taxes on the land. A farm in South Dakota was conveyed to plaintiff for $6,000 and the sum of $1,000 in cash was paid by the Jameses, who entered into possession of the premises. The contract *inter alia* provided as follows:

"That the said party of the first part (Ward) hereby agrees and binds himself and his heirs, that in case the aforesaid sum of Eighteen Thousand ($18,000.00) Dollars with the interest, shall be fully paid, at the times and in the manner above specified, he will on demand thereafter cause to be executed and delivered to the said party of the second part (James), or his legal representatives, a good and sufficient deed, in fee simple of the premises above described, free of all legal incumbrances except the taxes herein agreed to be paid by the party of the second part. And it is agreed that if the party of the second part shall fail to make any of the said payments at the time

and in the manner above specified, this agreement shall henceforth be utterly void, and all payments thereon forfeited, or said party of the first part may foreclose this contract for the amount due thereon, together with costs and attorney fees, second party to have possession of said premises from May 1, 1913, free of charge so long as he complies with the terms of this agreement."

Some livestock and personal property valued at $2,000 were transferred with the place which are not mentioned in the written agreement. On February 27, 1914, the defendants James entered into negotiations with the defendants Rickman for the transfer of the formers' interest in the property and for the assignment of the contract of sale which assignment was executed and recorded. The Rickmans entered into possession of the premises and remained there until after this suit was begun. On August 26, 1914, plaintiff commenced this suit for a strict foreclosure of the contract of sale, alleging that there was due and unpaid $952.26 interest, and $128.35, taxes on the land, which plaintiff was compelled to pay. The Jameses answered and asserted that the contract was made by W. F. James as agent for Mrs. Francis E. James and asked to have the same reformed in this respect, which was allowed. All the defendants defended upon the ground that there were defects and irregularities in Ward's title to the land and the Jameses asked to have the contract rescinded for that reason. REVERSED AND REMANDED WITH DIRECTIONS.

For appellant there was a brief over the names of *Messrs. Williams & Bean, Mr. Jesse G. Wells* and *Messrs. Foster & Hamilton,* with oral arguments by *Mr. John M. Williams* and *Mr. O. H. Foster.*

For respondents there was a brief over the name of *Messrs. Thompson & Hardy*, with an oral argument by *Mr. Charles A. Hardy.*

MR. JUSTICE BEAN delivered the opinion of the court.

1. It is contended by the plaintiff's counsel that the time for Ward to furnish a good title and convey the land to the Jameses or their assigns has not arrived and that the vendor is not in default in the premises; and therefore the contract of sale cannot be rescinded. The stipulation of the agreement of sale provides for a deed of conveyance to be made by Ward after the payment of the purchase price is completed. It appears that the consideration for the deed has not been paid nor tendered to Ward. In order to put Ward, the vendor, in default such payment, or a valid tender thereof, must be made to him according to the agreement of sale.

2. The assignment, or an arrangement for an assignment of the contract by the Jameses to the Rickmans did not change the status of the vendor. The Rickmans would stand in no better position than the Jameses did prior to such deal. Neither of the defendants is entitled to make the defense that there are defects in Ward's title and the Jameses are not entitled to rescind the contract of sale.

3, 4. It is sufficient if the vendor have good title when the vendee by payment or tender of the purchase money places himself in possession to demand title, where the vendee is in a position and there is no fraud: Waterman on Specific Performance, § 420. In actions by the vendor for the purchase money before the time when he is required by the contract to pass the title the purchaser cannot defend on the ground that the title is defective, since the vendor may acquire title be-

fore the specified time. It is sufficient if he has a good title at the time when the conveyance is to be made, and the objection that he had none when the contract was made will be unavailing. A purchaser in possession is estopped from denying the title of the vendor. The vendor and vendee stand in the relation of landlord and tenant: *Frink* v. *Thomas,* 20 Or. 265, 273 (25 Pac. 717, 12 L. R. A. 239); Maupin on Marketable Title to Real Estate, § 308, p. 741; 39 Cyc., pp. 1574, 1614; *Gervaise* v. *Brookins,* 156 Cal. 103 (103 Pac. 329). There can be no rescission and recovery of purchase price by the purchaser where the vendor is able and willing to perform within the time limited by the contract of sale: 39 Cyc. 2006. If the vendor fail to furnish good title at the time fixed for performance the purchaser may maintain an action to recover the price paid: 39 Cyc. 2009, note; *Eggers* v. *Busch,* 54 Ill. App. 279. Prior to the expiration of the time fixed for tendering the conveyance, James, the purchaser, cannot recover the partial payments made where no deed was required to be given by Ward until the balance of the price is paid, as agreed, the purchaser not having paid nor tendered the amount: *Sievers* v. *Brown,* 36 Or. 221 (56 Pac. 170), and cases there cited; *McAlpine* v. *Reicheneker,* 56 Kan. 100 (42 Pac. 339); *Woodward* v. *Van Hoy,* 45 Mo. 300. Where the payment of the purchase money or a deferred portion thereof and the making or tender of the deed are to occur simultaneously they are regarded as mutual and concurrent acts which disable either party from putting an end to the contract, without performance or a valid offer to perform on his part: *Frink* v. *Thomas,* 20 Or. 265, 273 (25 Pac. 717, 12 L. R. A. 239).

After the negotiations between the Jameses and the Rickmans an abstract of title was prepared and

examined by an attorney, resulting in a letter from James to Ward requesting him to straighten out the title and put the same in a marketable condition. After the commencement of this suit it appears that plaintiff took steps to do this. James claims that $500 for the possessory right to a tract of land should be credited as a payment to Ward.

The rights and equities of the parties in the premises depend largely on what has taken place since the beginning of this litigation. From the present state of the record it would be impossible for this court to adjust the equities of the case with safety. From the findings of the trial court it does not seem that Ward does not own the land in question, but that the record does not show a perfect title in him. Plaintiff seeks a harsh and unfavored remedy of a strict foreclosure: Wiltsie on Mortgage Foreclosures, vol. 2 (3 ed.), § 965; 27 Cyc. 1648 (b). This should not be granted without the court being informed as to the present conditions and as to the prospect of a compliance with the terms of the contract on the part of the Jameses. Quite a large payment in land and cash has been made. It appears that the personal property transferred with the place has been partly dissipated which has a bearing on the case.

5. It is asserted by counsel for defendants in their brief that before a vendor can foreclose a sale contract, he must be able to tender and tender a title in accordance with his contract. This rule applies where the payment of the purchase money and the making of the conveyance are by the contract to be concurrent acts. It cannot be invoked where by the terms of the contract payments of installments of interest are to be made which are conditions precedent to the execution of a deed. In other words, making

a deed "in accordance with his contract" in this case means furnishing such conveyance when the stipulated payments are made. The rule as claimed would permit the purchaser under certain conditions to remain in possession of the premises for ten years without paying interest. The parties have made their agreement and should abide by the same.

The decree of the lower court should be reversed and the cause remanded with permission for the respective parties to make application to that court to present the issues of the case as they now exist, if they so desire, and for such further proceedings not inconsistent herewith as may seem proper. Neither party should recover costs in this court; and it is so ordered.

REVERSED AND REMANDED WITH DIRECTIONS.

MR. CHIEF JUSTICE MCBRIDE, MR. JUSTICE MOORE and MR. JUSTICE MCCAMANT concur.

Former opinion modified and rehearing denied May 29, 1917.

ON PETITION FOR REHEARING.

(164 Pac. 370; 164 Pac. 372.)

On petition for rehearing. Former opinion modified by dismissal without prejudice. Respondent to recover costs in the Circuit Court and the appellant the costs in this court.

Mr. M. Vernon Parsons and *Messrs. Thompson & Hardy*, for the petition.

Messrs. Williams & Bean, Mr. Jesse G. Wells and *Messrs. Foster & Hamilton, contra.*

Department 2. MR. JUSTICE MCCAMANT delivered the opinion of the court.

6–8. Defendants have filed a petition for a rehearing and we have re-examined the questions raised by this appeal. There can be no doubt of the correctness of the former opinion in so far as it denies defendants the right to rescind the contract and recover their payments thereon because of the defects in plaintiff's title. The defendants are entitled to certain credits on the purchase price, including $500 as the value of a homestead relinquishment, but after all credits are allowed they were still in default on the payment of interest when the suit was brought. This of itself precludes granting them the affirmative relief prayed for: *Eames* v. *Der Germania Turnverein,* 8 Ill. App. 663, 673, 674; *Ketchum* v. *Evertson,* 13 Johns. (N. Y.) 359, 365 (7 Am. Dec. 384); *Hudson* v. *Swift,* 20 Johns. (N. Y.) 24; *Green* v. *Green,* 9 Cow. (N. Y.) 46, 52. In order to put the vendor in default and claim a rescission of the contract the vendee must be ready to pay the entire purchase price, must offer so to do and demand a deed: *Eames* v. *Der Germania Turnverein,* 8 Ill. App. 663, 673, 674; *Foster* v. *Jared,* 12 Ill. 451, 454; *Hudson* v. *Swift,* 20 Johns. (N. Y.) 24. When, as in this case, the purchase price is payable at a time long subsequent to the date of the contract, a defect in the vendor's title does not call for a rescission of the contract, provided the sale is made in good faith and the vendor has not put it out of his power to perform the contract by some affirmative act, as a conveyance of the property to a third party. It is sufficient that he have title when the vendee has a right to a deed: *Thomas J. Baird Investment Co.* v. *Harris,* 209 Fed. 291, 297, (126 C. C. A. 217); *Winkler* v. *Jerrue,* 20 Cal. App. 555, 559 (129 Pac. 804); *Morris* v. *Columbia Canal Co.,* 75 Wash.

483, 486 (135 Pac. 238); *Reard* v. *Ephrata Orchard Homes Co.*, 78 Wash. 180, 187 (138 Pac. 678); *Golden Valley Land & Cattle Co.* v. *Johnstone*, 25 N. D. 148, 160 (141 N. W. 76); *Foster* v. *Jared*, 12 Ill. 451, 454, 455; *Eames* v. *Der Germania Turnverein*, 8 Ill. App. 663, 672; *Tanzer* v. *Bankers' Land & Mtg. Corp.*, 159 App. Div. 351, 144 N. Y. Supp. 613, 615; 39 Cyc. 1529. In the opinion of the writer the above rule is of doubtful wisdom as applied to the conditions under which real estate is marketed in Oregon, but it is a firmly established principle of the law of contracts and if it is to be departed from in this jurisdiction, the departure should be based on legislative action.

9. The principle as laid down in the books has its limitations; it is held that when the vendor calls on the vendee to perform his part of the contract the vendor must be able to pass title: *Eggers* v. *Busch*, 54 Ill. App. 279, 284. We think that the case at bar falls within the operation of this principle. Plaintiff seeks a strict foreclosure; he asks a decree requiring defendants within a limited time to pay the large sum of money still unpaid on the purchase price and in default of such payment to lose their interest in the property. It is only just to require plaintiff in such case to be able to furnish a good commercial title; the defendants may desire to borrow a part of the purchase price on the security of the land and they should be given a title adequate for such purpose. It is held that a vendor is not entitled to a forfeiture of the interest of the vendee unless he is in a position to furnish such a title as the contract calls for: *Bryson* v. *Crawford*, 68 Ill. 362, 365. This principle is held inapplicable when the only defect of title is an encumbrance of such size that it can be liquidated by the purchase price: *Reard* v. *Ephrata Orchard Homes Co.*, 78 Wash. 180 (138 Pac.

678); *True* v. *Northern Pacific R. Co.*, 126 Minn. 72, 77 (147 N. W. 948). In the opinion of the writer this exception to the rule should be further limited to cases where the purchase price has been set apart or appropriated to the payment of the encumbrance. Our holding that a vendor should be denied the remedy of foreclosure unless he is able to furnish such title as the contract calls for is supported by 39 Cyc. 1534 and *McKinney* v. *Jones*, 55 Wis. 39, 50 (11 N. W. 606, 12 N. W. 381).

The record sufficiently shows that plaintiff at this time does not have a good commercial title. It appears that he has brought suit to quiet his title and that this suit is contested. We forbear to express any opinion as to the merits of this litigation except in so far as the decision of this cause requires such expression. It is sufficient to say that the title of plaintiff is not such as an attorney for a purchaser should advise his client to accept, and that therefore it is not such as is called for by the contract of these parties.

10. Defendants contend that they are entitled to rescind because plaintiff failed to furnish an abstract of title and we are cited to a number of authorities in support of this contention. These were all cases in which the furnishing of such abstract was made a condition precedent by the contract of sale. The contract in the case at bar makes no mention of an abstract. Defendants contend that it should be reformed in this respect; it is doubtful if they are entitled to a reformation, but if the contract were so reformed we would have to hold that defendants have waived their right to rescind on this ground. It appears that defendants purchased an abstract and that they seek to counterclaim the price against plaintiff; furthermore, that they made a pay-

ment on the purchase price after plaintiff's alleged failure to furnish the abstract. They cannot now treat the furnishing of an abstract as a condition precedent: *McAlpine* v. *Reicheneker*, 56 Kan. 100 (42 Pac. 339).

As a result of our re-examination of the issues we think the decree should be one of dismissal without prejudice. The defendants should recover their costs and disbursements in the lower court, and plaintiff should have a like recovery here.

MODIFIED. REHEARING DENIED.

MR. CHIEF JUSTICE MCBRIDE, MR. JUSTICE MOORE and MR. JUSTICE BEAN concur.

Argued on motion to set aside restraining order May 22, 1917. Temporary injunction dissolved May 29, 1917.

NOYES-HOLLAND LOGGING CO. *v.* PACIFIC LIVE STOCK AND LUMBER CO.

(165 Pac. 236.)

Appeal and Error — Supreme Court — Jurisdiction—Injunction—Pendente Lite.

1. The Supreme Court will not continue an injunction restraining a plaintiff in ejectment from proceeding because a chancery suit affecting defendants' right to the property is pending on appeal, where the parties are solvent and defendant's rights can be adequately protected after determination of the chancery appeal.

Courts—Discretion of Court—Injunction—Dissolution.

2. A temporary restraining order granted without notice to opposing party is subject to dissolution on proper showing, and the question of whether or not the justice who granted the same abused his discretion is not involved.

[As to right to grant temporary injunction before institution of action, see note in **Ann. Cas.** 1913E, 462.]

From Columbia: JAMES A. EAKIN, Judge.

Suit on cross-bill in equity by the Noyes-Holland Logging Company, a corporation, and the Portland

Lumber Company, a corporation, are plaintiffs-appellants, against the Pacific Live Stock & Lumber Company, a corporation, and M. T. O'Connell are defendants-respondents, in which suit the appellants prayed for and obtained, *ex parte,* a temporary restraining order, *pendente lite.* Respondents move to dissolve the injunction. Temporary injunction dissolved.

Department 1. Statement PER CURIAM.

The Pacific Live Stock & Lumber Company began an action in ejectment to recover from the plaintiffs here the possession of the southwest quarter of the southwest quarter of section 3, township 7 north, range 3 west, in Columbia County. These plaintiffs interposed a cross-bill in equity whereby they sought to correct an alleged mistake in a contract between the Portland Lumber Company and M. T. O'Connell granting them the right of way for a logging railroad over his land so that they could justify their possession of the land in dispute under the agreement as thus amended. As part of the relief sought under the cross-bill they prayed for injunction against the prosecution of the law action and to that end obtained a temporary restraining order *pendente lite.* The Circuit Court heard the cross-bill on its merits after issue formed thereon and dismissed it allowing the ejectment action to proceed. These plaintiffs then appealed and gave a bond stipulating for the payment of all costs, disbursements and damages which might be adjudged against them on the appeal. Their opponents, however, prepared to try the action of ejectment, whereupon plaintiffs in the suit applied to and obtained from one of the justices of this court *ex parte* a temporary injunction forbidding the prosecution of the action. The case has

been presented to us on a motion to dissolve this temporary injunction.

TEMPORARY INJUNCTION DISSOLVED.

Mr. Thomas Mannix, for the motion.

Mr. Hugh Montgomery and *Messrs. Platt & Platt, contra.*

Opinion PER CURIAM.

1. The leading case on this subject is *Livesley* v. *Krebs Hop Co.,* 57 Or. 352 (97 Pac. 718). It was there decided that although injunction was not within the original jurisdiction of this court, yet in order to preserve its jurisdiction over the subject of the suit on appeal it would issue a temporary restraining order *pendente lite.* In that suit the plaintiffs sought to prevent the Krebs Hop Company from enforcing a judgment against them on the ground that the company was insolvent and that, having a good reason for resisting the judgment on appeal, the remedy would be entirely lost to the plaintiff on account of the insolvency of the concern claiming the judgment. Manifestly, under such circumstances, the court would find its efforts futile to render complete justice in the case on account of the inability of the company to restore what it might have unjustly collected. In *Kellaher* v. *Portland,* 57 Or. 575 (110 Pac. 492), Mr. Justice EAKIN said:

"This court cannot by injunction protect property rights, or enjoin acts that might result in damage to a litigant. This is the province of the Circuit Court, and this court can only review its action on appeal."

To a like effect is *Brice* v. *Younger,* 63 Or. 4 (123 Pac. 905).

In this case there is no suggestion of the insolvency of either party or that the estate of either of them in

the land will be irretrievably clouded or destroyed unless the injunction be continued to the end of the litigation. As said in *Brice* v. *Younger, supra,* the plaintiff in ejectment would proceed at his peril while the cross-bill remains open for the consideration of this court. If the proceeding in chancery is well founded the court can exercise its equitable powers in restoring the defendant in ejectment to its former situation at the expense of opposing parties. There is no pretense that the equitable authority of the court will be paralyzed if occasion should arise for its use.

2. All the cases hold that injunction in such instances rests in the sound discretion of the court. The temporary restraining order having been granted without notice to the opposing parties, it is of course subject to dissolution on a proper hearing and the question of whether or not the justice who granted it abused his discretion is not here involved. It not being apparent to the court that the rights of either party will be prejudiced beyond repair by withholding this injunction, an order will be entered dissolving the temporary restraining order so that the action in ejectment may regularly proceed subject of course to the final disposition of the cross-bill. INJUNCTION DISSOLVED.

Argued May 7, modified May 29, 1917.

BISHOP *v.* HENRY.

(165 Pac. 237.)

Mechanics' Liens—Mines and Minerals—Nature of Lien.

1. A mechanic's or miner's lien is a creation of the statute, which must be looked to for the right to file any such lien.

[As to validity of mechanics' lien laws, see note in Ann. Cas. 1912C, 339.]

Mines and Minerals—Claim of Lien—Ownership of Property.

2. Section 7445, L. O. L., requiring every laborer or materialman claiming a lien on a mine, etc., to file a claim, containing a statement of his demand, with the name of the owner or reputed owner, if known, and the name of the person by whom he was employed, or to whom he furnished the materials, is complied with by a statement, that the person against whom the lien is claimed is the owner and reputed owner, or by a statement in the alternative that a designated person is the owner or reputed owner.

Mines and Minerals—Claim of Lien—Ownership of Property.

3. Under Section 7445, L. O. L., the claim of lien need not state the name of the owner when such owner is not known.

Judgment—Conclusiveness—Persons not Parties.

4. H., the daughter of a person formerly owning an interest in mining claims, obtained letters of administration, and with the consent of defendant, who also owned an interest, entered into possession for the purpose of working the property, and representing the interest of the estate. Defendant then made no claim that the estate had no interest. A controversy having arisen, H. abandoned the administration of the estate, and she and her associates filed relocation notices, and obtained supplies and labor from persons who believed her and her associates to be the owners of the claim. Afterwards defendant brought suit and obtained a decree declaring him the sole owner of all the claims as against H. and her associates. *Held* that, as against the persons furnishing labor and supplies and claiming liens, who were not parties to the suit, the decree took effect as of its date, and did not determine their rights.

Mines and Minerals—Liens—Consent of Owner.

5. As H. and her associates went into possession with defendant's permission, he should have posted notices as provided by Section 7444, L. O. L., in the case of owners of a mine worked by lessees or by persons other than the owner, if he desired to prevent liens attaching to the claims.

Mines and Minerals—Liens—Claim of Lien.

6. Lien notices stating that H. and her associates were the agents of the owner of the claim and were the owners and reputed owners thereof were sufficient without naming defendant; as Section 7445, L. O. L., requiring the name of the owner or reputed owner, "if known," was apparently intended to apply to such a case where title in fee was in the government, and neither party had much more than a possessory right.

Mines and Minerals—Liens—Enforcement—Attorney's Fees.

7. In a suit to foreclose mining liens for labor performed and materials and supplies furnished by plaintiff and by other persons who had assigned their claims to plaintiff, it was immaterial whether reasonable attorney's fees should be allowed for all the claims in the aggregate or singly.

From Baker: GUSTAV ANDERSON, Judge.

Suit to foreclose mining liens by F. W. Bishop against Susie Norwood Henry, Steve Chaplin, Grace

Carmalt, A. W. Eastham, George W. Paris, George Hansell, Joe Kingsbury and R. C. Crawford, for materials, supplies and labor upon a certain mill and mining claims. The court below decreed a lien upon the mill and the real property but refused any lien as to the mining claims. Plaintiff and defendant, Kingsbury, appeal. Modified.

In Banc. Statement by MR. JUSTICE BEAN.

This is a suit to foreclose certain quartz mining liens on what is commonly known as the Norwood mines. Those claimed by plaintiff are for labor performed and materials and supplies furnished by him and his assignors between March 1 and November 3, 1913. Defendant Kingsbury claims a lien for services commenced in 1908 and continued until November 3, 1913. The court decreed a lien upon a certain mill upon the premises but denied any upon the mining claims. Plaintiff and defendant Kingsbury appealed.

A brief statement of the facts leading up to this controversy is as follows: In 1893 H. W. Norwood made amended locations of three of the mining claims, the Keystone, Empire and Amadore. His wife, Cora S. Norwood, made amended locations of three others, the Snowflake, Lilly and May Flower. The Lilly, Amadore and another, the Nettie May, were conveyed to defendant Crawford. Afterwards these were all known as the Keystone mines for a time. Mr. and Mrs. Norwood and Mr. Crawford each claimed a one-third interest therein and developed the claims in common as a group. Crawford advanced money to the Norwoods upon this arrangement. Mr. Norwood died, and in 1903 Mrs. Norwood executed two mortgages covering her interest in the premises. These were foreclosed in 1904 and the property sold to defendant

A. W. Eastham, trustee. In 1908 defendant, Susie Norwood Henry, a daughter of H. W. Norwood, went to Baker County where she applied for letters of administration of his estate which were granted. She understood and represented that three of the claims in question belonged to his estate. She consulted with defendant Crawford who made no claim to the contrary and who believed that the Norwoods still owned an interest in the mines. With his permission she and Grace Carmalt entered into possession of the premises, moving into a cabin thereon, for the purpose of working the property and representing the one-third interest belonging to the Norwood estate. It was mutually understood that Crawford was to continue his possession, represent his one-third interest, that all were to co-operate and work the mines as a group, and that each had a one-third interest therein respectively. This plan was continued until a controversy arose in 1909 when Crawford presented a claim against the Norwood estate for assessment work done on the mines for it which was disallowed. During that year objections being made by Crawford to the final settlement of the estate, Susie Norwood Henry abandoned the administration thereof, and she and her associates on different dates filed relocation notices upon the quartz claims embraced in the Keystone group, and also located other claims. These were afterwards known as the Norwood mines. So far as the county records showed Susie Norwood Henry and her associates were the owners of the claims. Early in the summer of 1913 the last-named claimants commenced the construction of a mill upon the premises and requested and obtained from plaintiff, a hardware merchant in Baker, and his assignees, other merchants, credit for hardware, merchandise, supplies, meat, etc.,

for about thirty days, until the mill could be operated and returns realized. Mrs. Henry and Grace Carmalt resided upon the mining claims, were reputed to be and were believed by these merchants to be the owners thereof. Defendant Crawford lived about a quarter of a mile from the mines and, as he states, could see what was being done thereon. The mill was built and run for a short time. Meanwhile Crawford had succeeded to the interest of A. W. Eastham in the mines, the date of which is not clearly indicated by the record, it probably being developed in the suit hereafter mentioned. After arrangements were made, a considerable portion of the supplies furnished to the mines and the labor performed thereon, Crawford commenced a suit on July 26, 1913, against Susie Norwood Henry, Grace Carmalt, Steve Chaplin and A. W. Eastham, trustee, in which a decree was entered August 31, 1914, declaring that the claims were not subject to relocation by Susie Norwood Henry and her associates, and that as to them Crawford was the sole owner of all the claims constituting the Keystone group. The findings of fact and conclusions of law of the Circuit Court in that suit were introduced in evidence, but not the whole record. It appears that Norwood's interest as well as that of Mrs. Norwood had been conveyed.

MODIFIED.

For appellants there was a brief over the names of *Mr. Orville B. Mount* and *Mr. A. A. Smith,* with an oral argument by *Mr. Mount.*

For respondent, R. C. Crawford, there was a brief and an oral argument by *Mr. Charles H. McColloch.*

No appearance for other respondents.

MR. JUSTICE BEAN delivered the opinion of the court.

Crawford resists the liens sought to be foreclosed in this suit begun November 26, 1913. He consented to the removal of the mill which has been sold for $500, and a portion of the proceeds are in the hands of the county clerk. The question involved herein relates to the mining claims. The several liens were filed to secure payment for materials and supplies furnished and labor performed in the development of the mines. The lien notices were similar. In that of Hans C. Olson it is stated in part thus:

"That the said mining claims are known as the Norwood group of mining claims and are situated about eight miles northeast of the city of Baker; that the same are contiguous and are worked through common shafts, tunnels, excavations and workings and by means of one mill or ore reduction works; that said labor so performed was upon said Norwood group of mining claims above described, and upon that certain five-stamp mill situated upon said mining claims, all of which said mill, mill buildings, structures and machinery being situated upon the said Norwood group of mining claims and used in the working and mining of the same; that the said Susie Norwood Henry, Grace Carmalt and Steve Chaplin were the agents of the owners of said mining claims, mill, structures and machinery and hired this claimant to perform the work, labor and services aforesaid and the said Susie Norwood Henry, Grace Carmalt and Steve Chaplin are the owners and reputed owners of said mining claims hereinabove described and of said mill, structures and machinery, and caused said work and labor to be performed."

In one or two of the lien notices the name of A. W. Eastham, trustee, is included as owner.

It is contended by defendant Crawford: (1) That the lien notices were not effective and do not support

the liens for the reason that the name of R. C. Crawford, who was afterwards declared to be the sole owner, was not stated therein; and (2) that Crawford never authorized the expenditure upon the mines. Section 7444, L. O. L., provides in part as follows:

"Every person who shall perform labor upon, or furnish material for the working or development of any mine, * * and any person who shall do work or furnish material for any road, tramway, train (trail), flume, ditch or pipe line, building, structure or superstructure used for, or in connection with the working or development of any such mine, * * and any person who shall perform labor or service in freighting or packing any material or supplies for the use, working or development of any such mine, * * and any person who shall furnish any provisions, materials or supplies for the working or development of any such mine, * * structure or superstructure, shall have a lien on such mine * * to secure to him the payment for the work or labor done, or material furnished, * * provided, that when two or more mines, lodes, mining claims or deposits are owned or claimed by the same person or persons, and worked through a common shaft or tunnel, * * then all the mines, * * shall, for the purpose of this act, be deemed one mine; * * and provided further, that this section shall not be deemed to apply to the owner or owners of any mine, * * when the same shall be worked by a lessee or lessees, or by any person or persons other than the owner; provided further, that the owner or owners * * post, or cause to be posted, * * a notice in writing, * * stating the name or names of the lessees, or other person or persons other than the owner operating said property, and that the owner or owners thereof will not be responsible for any debt or debts contracted by the lessee or lessees, or other person or persons other than the owner, in connection with the working, operation or development of such property. * * The failure of any owner or owners of such property to post the notices above provided for, and secure the proper recording

thereof, shall be deemed conclusive proof of the consent of such owner or owners that his or their interest in such mine shall be subject to any lien filed under the provisions of this act."

Section 7445, L. O. L., provides in substance that it shall be the duty of every laborer or materialman claiming a lien, within sixty days after he has ceased to labor or furnish materials therefor, to file with the proper county clerk a claim containing a true statement of his demand, after deducting all just credits and offsets—

"with the name of the owner or reputed owner, if known, and also the name of the person by whom he was employed or to whom he furnished the materials, and also a description of the property to be charged."

1–3. A mechanic's or miner's lien is a creation of the statute to which we must look for the right to file any such lien: 2 Snyder on Mines, § 1705. The provision of the statute that the claim of lien shall state the name of the owner or reputed owner, if known, is complied with by a statement that the person against whom a lien is claimed is the owner and reputed owner. A statement in the alternative that a designated person is the owner or reputed owner is also sufficient under such a statute: 2 Jones on Liens (3 ed.), § 1401; *Gordon* v. *Deal,* 23 Or. 153 (31 Pac. 287); *Haines Com. Co.* v. *Grabill,* 78 Or. 375, 381 (152 Pac. 877); *Arata* v. *Tellurium Gold & Silver Min. Co.,* 65 Cal. 340 (4 Pac. 195); *Abelman* v. *Myre,* 122 App. Div. 470 (106 N. Y. Supp. 978); *McPhee* v. *Litchfield,* 145 Mass. 565 (14 N. E. 923, 1 Am. St. Rep. 482); *Minor* v. *Marshall,* 6 N. M. 194 (27 Pac. 481). Our statute contemplates that in certain cases the name of the owner may not be known, and in such event it is unnecessary that the notice contain the same: 2 Jones on Liens (3 ed.), § 1401.

4, 5. There is no claim in this suit that Crawford posted any notice of nonliability within the purview of the statute. His main reliance is based upon the decree of August 31, 1904. As to the claimants who were not parties to that suit, the decree is analogous to a foreclosure of the former claims, other than his own, and took effect as of that date. It does not determine the rights of these lien claimants which were created before that time and were not foreclosed nor affected. At the commencement of their connection with the mines Susie Norwood Henry and Grace Carmalt went into possession thereof for the purpose of working the properties and representing the one-third interest supposed to belong to the Norwood estate. This was all done with the consent and acquiescence of defendant Crawford. In so far as these claimants are concerned the authority given by Crawford and his sanction for these parties to work the mine was of just as much force as though he had leased the property to Mrs. Henry and her associates and executed a written lease therefor. Had he desired not to become liable for any work done upon these mines by the parties whom he let into possession, he should have posted notices as provided by the statute: See *Haines Com. Co.* v. *Grabill,* 78 Or. 375 (152 Pac. 877). Crawford's position is entirely different from what it would be had the parties incurring the indebtedness entered into possession of the mines without his sanction or authority: *Loud* v. *Gold Ray Realty Co.,* 72 Or. 155 (142 Pac. 785); *Post* v. *Fleming,* 10 N. M. 476 (62 Pac. 1087); *Hamilton* v. *Delhi Min. Co.,* 118 Cal. 148 (50 Pac. 378); 27 Cyc. 772.

6. In *Bitter* v. *Mouat Lumber & Inv. Co.,* 10 Colo. App. 307 (51 Pac. 519), it was held that a lien claimant can be charged only with knowledge of the ownership of

property as apparent upon the public records. In equity and good conscience defendant Crawford should not now be allowed to claim that Mrs. Henry and Grace Carmalt were not the owners, rightfully in possession of, and working the claims in suit, when he permitted them to hold out to the world that they were the rightful owners thereof. He stood idly by from 1907, when he allowed them to take possession of the mines, until 1915, when most of the indebtedness for which liens are claimed was incurred. Then, as he states, in July, 1913, or somewhere along there, he concluded that he owned all the mines. Prior to that time he claimed only a one-third interest. As to these lien claimants the die was cast before Crawford brought his suit: See Bigelow on Estoppel (2 ed.), p. 453. By a tardy suit which became effectual in August, 1914, he should not be allowed to defeat the claims of those who in good faith extended credit on account of the mines to which were charged merchandise and supplies furnished in the development thereof. Our statute directing that a notice of lien shall state the name of the owner or reputed owner of the property sought to be charged, if known, seems to have been enacted for just such a case as this where the title in fee is in the United States government and neither party has much more than a possessory right to the claims. The lien notices, the complaint and the proof are in conformity with the statute and are sufficient to sustain the liens: 13 Enc. Pl. & Pr., p. 969 et seq.

Objection is made to the amount of defendant Kingsbury's claim. The work was done during the several years named, and accurate accounts do not appear to have been kept by him. With a little assistance he constructed a 90-foot tunnel, other work was done on the mines, and supplies and materials were transported

in the development thereof. After a careful consideration of all the evidence, $1,111.50 is found to be due Kingsbury and allowed him upon his own lien, and the further sum of $228.50, due upon the lien of his assignor, Hans C. Olson, making a total of $1,340, together with $125, attorney's fees. The claims of plaintiff are approved as found by the trial court.

7. Objection is made to the form of the allowance of attorney's fees for plaintiff. We see no merit in this claim nor any material difference in allowing reasonable attorney's fees for all the claims in the aggregate or singly. The decree of the trial court is modified as herein indicated and the amounts allowed claimants will be declared to be a lien on the mines described in the complaint. MODIFIED.

Argued May 7, affirmed May 29, 1917.

STODDARD LUMBER CO. *v.* OREGON-WASHINGTON R. & N. CO.

(165 Pac. 363.)

Carriers—Carriage of Goods—Delivery—Duty of Carrier.

1. At common law, when it became impossible for a common carrier to deliver shipments in accordance with the contract of carriage, it was its duty to exercise ordinary care and diligence for the protection of the property of the owner.

Carriers—Carriage of Goods—Failure to Deliver Goods to Consignor.

2. Where a common carrier is unable to deliver the goods shipped to the consignee, it is its duty to exercise due diligence to notify the consignor within a reasonable time.

Carriers—Carriage of Goods—Failure to Deliver—Notice.

3. Where a common carrier is unable to deliver the goods shipped to the consignee, the burden is upon it to show a state of facts relieving it from its duty to notify the consignor within a reasonable time.

Carriers—Carriage of Goods—Notice of Failure to Deliver.

4. Where goods are consigned by a shipper to its own order, with directions to notify a person named, upon failure of the carrier to

deliver the goods it is not sufficient that it notify such person, but it must notify the consignor, if the bill of lading shows that he is the owner of the goods.

Carriers—Carriage of Goods—Connecting Carriers—Notice of Nondelivery.

5. Where a carrier is unable to deliver the goods, which have been shipped through connecting carriers, the Carmack Amendment treats such carriers as if they were controlled by a single corporation, and the initial carrier is not relieved of its duty to notify the consignor because the terminal carrier did not know his residence; such carrier being chargeable with the knowledge of the initial carrier thereof.

[As to burden of proof as between connecting carriers as to which one is liable, see note in 101 **Am. St. Rep.** 392.]

Carriers—Carriage of Goods—Notice of Nondelivery.

6. Where goods are shipped to the consignor's order, with directions to notify the purchaser of the goods, the carrier cannot extend credit to such person, but must give notice of nondelivery not later than the day following that on which the goods were offered to the purchaser.

Carriers — Carriage of Goods — Notice of Nondelivery — Carmack Amendment.

7. Under the Carmack Amendment (Act June 29, 1906, c. 3591, § 7, 34 Stat. 595 [U. S. Comp. Stats. 1916, § 8604a]), providing that any common carrier, receiving property for transportation from a point in one state to a point in another state, shall issue a receipt or bill of lading therefor, and shall be liable to the lawful holder thereof for any loss caused by it, or by any common carrier to which such property may be delivered, or over whose lines such property may pass, the initial carrier is liable for the failure of the terminal carrier to properly notify the consignor of failure to deliver goods shipped.

Appeal and Error—Review—Harmless Error.

8. In an action against an initial carrier for damages because of the terminal carrier's failure to give notice of nondelivery of the goods shipped, admission of evidence of the custom of railway companies to give notice when the shipment cannot be delivered, if error, was harmless, where such evidence only tended to charge defendant with its legal duty.

Carriers—Carriage of Goods—Nondelivery of Goods.

9. Where goods are shipped to the consignor's order with directions to notify purchaser thereof, the carrier will not be relieved of its duty to exercise due diligence in caring for goods because of the fact that the consignee is derelict in his duty to receive the goods.

Carriers—Carriage of Goods—Notice of Nondelivery—Agency.

10. Where goods are shipped to the consignor's order, and the bills of lading are sent to a bank at destination, such bank is the consignor's agent for the purpose of presenting the draft only, and not for the purpose of receiving notice that the goods cannot be delivered.

Carriers—Carriage of Goods—Notice of Claim.

11. In an action against a common carrier for damages, due to failure to notify consignor of nondelivery of goods, failure to present a formal bill as a claim for damages within the time limited in the contract was not fatal, where defendant was notified in writing that the consignor had a claim against them and insisted upon its payment; such notification having been given in due time.

Appeal and Error—Review—Harmless Error—Instructions.

12. In an action against a common carrier for failure to notify the consignor of nondelivery, an instruction that the measure of damages was the difference between the market value of the goods when notice should have been given and their value when it was actually given, if erroneous, was harmless, where the verdict gave the proper amount of damages.

Carriers—Carriage of Goods—Notice of Nondelivery.

13. In an action against a common carrier for damages due to failure to give the consignor notice of nondelivery, where the bill of lading provided that the purchaser should have 10 days within which to pay for the goods, the duty did not devolve upon the carrier to give notice of nondelivery until after the expiration of such 10 days.

Appeal and Error—Presentation of Grounds—Failure to Raise Question.

14. Questions not raised in the lower court will not be reviewed.

From Baker: GUSTAV ANDERSON, Judge.

Action for damages by the Stoddard Lumber Company, a corporation, against the Oregon-Washington Railroad & Navigation Company, a corporation. From a judgment entered on a verdict of a jury in favor of plaintiff, defendant appeals. Affirmed.

In Banc. Statement by MR. JUSTICE MCCAMANT.

This is an action brought to recover damages sustained by plaintiff's assignors, Stoddard Lumber Company, a Utah corporation, and Shockley & McMurren Lumber Company, by reason of the alleged failure of a connecting carrier of the defendant to notify plaintiff's assignors of the nondelivery of shipments of box shooks carried over the lines of defendant and its connecting carriers, in the year 1912. The complaint sets up five causes of action. It appears that plaintiff's

assignors had received orders from Pierce & Maternes, of Hotchkiss, Colorado, for the shooks in question and that pursuant to these orders the first carload was shipped from Baker, Oregon, July 29, 1912, reaching Hotchkiss on August 12th. The car mentioned in the second count of the complaint left Baker August 2d and reached Hotchkiss August 14th; that mentioned in the third count left Baker August 17th, arriving at Hotchkiss September 7th; that in the fourth count left Baker August 19th and reached Hotchkiss September 4th; that mentioned in the fifth count, being the car sold by Shockley & McMurren Lumber Company, left Baker August 10th and reached Hotchkiss August 23d. The shipments were in each case consigned to the order of the shipper and a direction was written on the bill of lading requiring the carrier to notify Pierce & Maternes. The bill of lading in each case was handed by plaintiff's assignors to the Baker Loan & Trust Company, by which course it was transmitted to the Bank of North Fork at Hotchkiss, Colorado. A draft for the purchase price accompanied the bill of lading, and the instructions given to the Hotchkiss bank required it to insist upon payment of the draft before surrender of the bill of lading.

The goods in each case reached Hotchkiss over the lines of the Denver & Rio Grande Railroad Company. It is conceded that this carrier notified Pierce & Maternes and that Pierce & Maternes failed to take up the bills of lading. The defendant alleges in its answer that these purchasers promised from day to day that they would secure the bills of lading and accept delivery of the goods, but no evidence was offered in support of this allegation. No notice was given plaintiff's assignors of the nondelivery of the goods, and on September 26th they applied to the de-

fendant at Baker to send a tracer after the shipments. On the following day, September 27th, they were notified that the box shooks were still undelivered at Hotchkiss. The shooks were suitable for the making of peach boxes and for no other purpose. At the time when they reached Hotchkiss the evidence satisfactorily shows an active market for peach boxes, justifying the conclusion that if plaintiff's assignors had been promptly notified they could have disposed of the goods. About September 15th the peach crop in that part of Colorado was destroyed by frost and thereafter the box shooks were unsalable. By the time plaintiff's assignors were notified of the nondelivery of the goods considerable charges had accumulated against them for freight and demurrage. Plaintiff's assignors refused to pay these charges. The railroad company thereupon stored the goods in the vicinity and sold them during the following season, accounting to plaintiff's assignors for the net proceeds, which were received under a stipulation that plaintiff should not be prejudiced thereby in this litigation.

Plaintiff claims the right to charge the defendant with the dereliction of its connecting carrier, under the Carmack Amendment to the Interstate Commerce Law. The jury found for plaintiff in the invoice value of the shipments, less the sums which had been paid plaintiff's assignors on the sale of the box shooks in 1913. The defendant appeals. AFFIRMED.

For appellant there was a brief over the names of *Mr. William D. Riter* and *Mr. James H. Nichols,* with an oral argument by *Mr. Riter.*

For respondent there was a brief and oral argument by *Mr. John L. Rand.*

MR. JUSTICE MCCAMANT delivered the opinion of the court.

Plaintiff's right of action in this case is based wholly on its contention that where goods cannot be delivered by a terminal carrier in accordance with the contract of transportation, the duty devolves on such carrier to notify the owner of the goods, whether he be consignor or consignee. This principle is challenged by counsel for defendant. The liability of an initial carrier under the Carmack Amendment is only that imposed by the common law on its connecting carrier: *Adams Express Co.* v. *Croninger,* 226 U. S. 491, 511 (57 L. Ed. 314, 44 L. R. A. (N. S.) 257, 33 Sup. Ct. Rep. 148); Judson on Interstate Commerce (2 ed.), § 46. The common law was evolved before the days of mail and telegraphs. We cannot, therefore, expect to find in the common law anything more than a statement in general terms of the duties devolving on a common carrier when it becomes impossible for the carrier to deliver shipments in accordance with the contract of carriage.

1. The common-law principle is that in such case the carrier is charged with the duty of ordinary care and diligence for the protection of the property of the owner: 4 Elliott on Railroads (2 ed.), § 1463; 2 Hutchinson on Carriers (3 ed.), § 714. What, then, is the duty which ordinary care and diligence, as applied to the conditions under which we live, impose upon a terminal carrier when it is unable to deliver a shipment at the point of destination? The shipments so carried by interstate carriers are of great variety; some of them are perishable, many of them fluctuate in value, many of them are valuable only in limited territories and for short seasons, and their marketing often requires special skill and instruction. It is not

to be expected that the terminal agents of the carrier will be advised in all cases of the value of the shipments, or of the proper method of caring for them and protecting their owners from loss. The Interstate Commerce Commission, in the case of *Kehoe & Co.* v. *Nashville etc. Ry. Co.*, 14 I. C. C. 555, 556, said:

"It is in the interest of the public that the consignor should be promptly notified when the shipment is not delivered."

We think the interests of the carrier are subserved by a rule which requires notice to the consignor within a reasonable time after the refusal or failure of the consignee to accept delivery. A rule which requires such prompt notification will be of value in releasing the rolling stock of the carrier and making it available for future business. Ordinarily, a postcard notification would be sufficient.

2. There is a conflict of authority on the question as noted by this court in *Normile* v. *Oregon Nav. Co.*, 41 Or. 177, 182 (69 Pac. 928). We think the weight of authority sustains the principle that in such case the carrier must exercise due diligence to notify within a reasonable time: 5 Thompson on Negligence, § 6622; 12 Am. & Eng. Enc. Law (2 ed.), 557; *Nashville etc. R. Co.* v. *Dreyfuss-Weil Co.*, 150 Ky. 333 (150 S. W. 321); *American etc. Co.* v. *McGhee*, 96 Ga. 27 (21 S. E. 383); *Alabama etc. Co.* v. *McKenzie*, 139 Ga. 410 (45 L. R. A. (N. S.) 18, 77 S. E. 647); *Michigan Co.* v. *Harville*, 136 Ill. App. 243, 253; *Carrizzo* v. *New York etc. Ry. Co.*, 66 Misc. Rep. 243 (123 N. Y. Supp. 173); *Fine* v. *Barrett*, 81 Misc. Rep. 234 (142 N. Y. Supp. 533); *Sauer* v. *Lehigh Valley R. Co.*, 150 N. Y. Supp. 977. This court is partially committed to the doctrine of these authorities: *McGregor* v. *Oregon Ry. & Nav. Co.*, 50 Or. 527, 536, 537 (93 Pac.

465, 14 L. R. A. (N. S.) 668). As applied to interstate shipments the question is one of federal law and the federal Supreme Court is the final arbiter. Its decisions trend in the direction of the above rule: *The Thames,* 14 Wall. 98, 107 (20 L. Ed. 804); *North Penn. R. Co.* v. *Commercial Nat. Bank,* 123 U. S. 727, 734 (31 L. Ed. 287, 8 Sup. Ct. Rep. 266).

3. Circumstances will doubtless arise from time to time which will relieve the carrier from this duty, as for example, when the owner of the goods has no place of abode: *Butler* v. *East Tennessee etc. R. Co.,* 8 Lea (Tenn.), 32, 34. The burden of showing such a state of facts devolves on the carrier.

The authorities cited by the defendant state no consistent rule. Some of them hold that the duty of carriers is a variable duty, dependent upon the circumstances: *The Keystone* v. *Moies,* 28 Mo. 243, 246 (75 Am. Dec. 123); *Manhattan etc. Co.* v. *Chicago etc. R. Co.,* 9 App. Div. 172 (41 N. Y. Supp. 83, 85); *Kremer* v. *Southern Express Co.,* 6 Cold. (46 Tenn.) 356. Some of the authorities relied on by defendant involve no question of notice: *Fisk* v. *Newton,* 1 Denio (N. Y.), 45 (43 Am. Dec. 649); *Ginnochio etc. Co.* v. *Missouri etc. R. Co.,* 153 Mo. App. 598 (134 S. W. 1028). Others of the authorities cited sustain defendant's contentions: *Hudson* v. *Baxendale,* 2 Hurl. & N. 575; *Weed* v. *Barney,* 45 N. Y. 344 (6 Am. Rep. 96). These cases are out of harmony with the weight of American authority and, in our judgment, are not sustained by sound reasoning.

The lower court charged the jury in the case at bar that the terminal carrier was chargeable with the duty of due diligence in the protection of the property of plaintiff's assignors and that if the jury found that reasonable care of the property required notice to

plaintiff's assignors, then the jury should find for plaintiff on this issue. We think the charge of the court was more favorable to the defendant than was warranted by the law.

4. The defendant contends that the above principle is inapplicable to this case because the goods were consigned by the shipper to its own order, with directions to notify Pierce & Maternes; that by this method of shipment the shipper made Pierce & Maternes its agents for the purpose of receiving notice, and that when the terminal carrier gave notice to Pierce & Maternes it fulfilled its duty in the premises. This contention of the defendant is supported by the case of *Hardin Grain Co.* v. *Chicago etc. R. Co.*, 134 Mo. App. 681 (114 S. W. 1117, 1118). On this issue plaintiff relies largely on the case of *Nashville etc. R. Co.* v. *Dreyfuss-Weil Co.*, 150 Ky. 333 (150 S. W. 321). The facts in this case are closely akin to those in the case at bar. Plaintiff in the Kentucky case shipped goods from Paducah, Kentucky, to De Soto, Georgia, consigned to itself, with instructions to notify R. E. Howe. Howe was notified by the terminal carrier and refused to take the goods. The carrier neglected to notify plaintiff, and while the goods were held in the carrier's warehouse they were destroyed by fire. The Kentucky court said:

"When the goods reached De Soto, Ga., and R. E. Howe, on being notified of their arrival, refused to accept them, it was incumbent upon the carrier to notify Dreyfuss-Weil Company of this fact, for, if they had been notified that their goods were there, they might have taken steps to protect themselves. The bill of lading showed that the goods were the property of Dreyfuss-Weil Company. The goods were consigned to their order. While there is some conflict in the decisions on the subject, the better rule is: That, where the consignee refuses to accept the goods, the carrier

must notify the consignor of this fact if the bill of lading is sufficient to show that he is the owner of the goods. This rule has the approval of the United States Supreme Court and the Supreme Court of Georgia. See *American Sugar Refining Co.* v. *McGhee,* 96 Ga. 27 (21 S. E. 383); Hutchinson on Carriers (3d ed.), § 721. When Howe refused to accept the goods, the carrier held them subject to the shipper's order, and notice to the shipper was essential to his protection. We therefore conclude that the Seaboard Air Line having failed to notify Dreyfuss-Weil Company of the refusal of Howe to accept the goods was liable to the shipper for the subsequent destruction of the goods while lying in its warehouse."

We think the case last cited correctly states the law. It appears from the books that goods are frequently shipped consigned to the order of the shipper, with instructions to notify someone for whom the goods are intended: *North Penn. R. Co.* v. *Commercial Nat. Bank,* 123 U. S. 727, 736 (31 L. Ed. 287, 8 Sup. Ct. Rep. 266); 4 Elliott on Railroads, 1427, 1530; 4 R. C. L., p. 842. The purpose of shipping in this manner is plain; it is the intention of the shipper in every such case to exact payment of the purchase price of the goods on delivery. In the case at bar plaintiff proved without objection from the defendant a general custom to ship in this manner when the shipper is unwilling to extend credit to the purchaser by whom the goods are ordered. The answer shows affirmatively that the purpose and effect of shipping in this manner were understood by the defendant.

5. The defendant contends that it should be relieved of the duty to notify in the case at bar because there was no evidence tending to show that the terminal carrier knew the residence of the consignor. The effect of the Carmack Amendment is to treat a line of connecting carriers as if they were owned and controlled by

a single corporation. The terminal carrier is chargeable with the knowledge of the initial carrier and it appears from the record in this case that plaintiff's assignors had many dealings with the defendant and the defendant must have been apprised of their place of business. We think, furthermore, that no carrier can be held to have fulfilled its duty of due diligence in the matter of notification when it has made no effort to notify the consignor at the place where the shipment originates.

6. There is no evidence of a refusal on the part of Pierce & Maternes to receive the goods in question, but the pleadings admit their failure so to do. The defendant contends that this circumstance differentiates the case at bar from the ordinary case, and that the terminal carrier was justified in assuming from day to day that Pierce & Maternes would take the box shooks, thus rendering notification unnecessary. We do not think that the duty of notification arises as a matter of law immediately on the tender of the goods to the purchasers unless the purchasers refuse to accept them. On the other hand, the carrier is unauthorized to extend any appreciable time by way of credit to the purchasers. The fact that the goods are consigned to the order of the shipper is evidence that the shipper is unwilling to extend credit to the purchaser. The principles of the law of agency forbid the carrier to extend to the purchaser a credit which the shipper was unwilling to grant. We think the duty of the carrier to notify is analogous to the duty arising under the law-merchant on the dishonor of negotiable paper and that therefore the notification should not be deferred beyond the day following that on which the goods are offered to the purchaser.

7. Plaintiff finds no fault with anything done by the defendant, basing its right of recovery wholly on the liability of the defendant under the Carmack Amendment to answer for the fault of the Denver & Rio Grande Railroad Company, the terminal carrier. The defendant contends that the Carmack Amendment is inapplicable to such a complaint as that made in the case at bar. The amendment in question, in so far as it is material to the present case, is as follows:

"That any common carrier, railroad, or transportation company receiving property for transportation from a point in one State to a point in another State shall issue a receipt or bill of lading therefor and shall be liable to the lawful holder thereof for any loss, damage, or injury to such property caused by it or by any common carrier, railroad, or transportation company to which such property may be delivered or over whose line or lines such property may pass": 34 Stats. at Large, p. 595.

The defendant cites *Norfolk etc. R. Co.* v. *Stuart's Draft Mill Co.,* 109 Va. 184 (63 S. E. 415, 416, 417); *Hogan Mill Co.* v. *Union Pacific Co.,* 91 Kan. 783 (139 Pac. 397). These authorities seem to sustain the defendant's contention, but the construction of this statute is a federal question and the United States Supreme Court has construed it: *New York etc. R. Co.* v. *Peninsula etc. Exchange,* 240 U. S. 34, 37 (60 L. Ed. 511, 36 Sup. Ct. Rep. 230). This was an action for damages arising from delay in the transportation of merchandise. It was contended that the initial carrier was not liable, inasmuch as no injury had been done to the goods, and the case therefore fell without the operation of the amendment. The court said:

"We need not review at length the considerations which led to the adoption of this amendment. These were stated in *Atlantic Coast Line* v. *Riverside Mills,*

219 U. S. 186, 199–203 (55 L. Ed. 167, 31 Sup. Ct. Rep. 164, 31 L. R. A. (N. S.) 7). It was there pointed out that along with singleness of rate and continuity of carriage in through shipments there had grown up the practice of requiring specific stipulations limiting the liability of each separate company to its own part of the through route, and, as a result, the shipper could look to the initial carrier for recompense only 'for loss, damage or delay' occurring on its own line. This 'burdensome situation' was 'the matter which Congress undertook to regulate.' * * The rule, said the court in defining the purpose of the Carmack Amendment, 'is adapted to secure the rights of the shipper by securing unity of transportation with unity of responsibility.' * * It is now insisted that Congress failed to accomplish this paramount object; that while unity of responsibility was secured if the goods were injured in the course of transportation or were not delivered, the statute did not reach the case of a failure to transport with reasonable despatch. In such case it is said that, although there is a through shipment, the shipper must still look to the particular carrier whose neglect caused the delay. We do not think that the language of the amendment has the inadequacy attributed to it. The words 'any loss, damage or injury to such property' caused by the initial carrier or by any connecting carrier are comprehensive enough to embrace all damages resulting from any failure to discharge a carrier's duty with respect to any part of the transportation to the agreed destination. It is not necessary, nor is it natural in view of the general purpose of the statute, to take the words 'to the property' as limiting the word 'damage' as well as the word 'injury' and thus as rendering the former wholly superfluous. It is said that there is a different responsibility on the part of the carrier with respect to delay from that which exists where there is a failure to carry safely. But the difference is with respect to the measure of the carrier's obligation; the duty to transport with reasonable despatch is none the less an integral part of the normal undertaking of the carrier. And we can gather no

intent to unify only a portion of the carrier's responsibility."

The initial carrier was held liable for the damage sustained.

For further authoritative construction of this legislation see *Georgia etc. R. Co.* v. *Blish Milling Co.*, 241 U. S. 190, 194 (60 L. Ed. 948, 36 Sup. Ct Rep. 541), and *Cleveland etc. R. Co.* v. *Dettlebach*, 239 U. S. 588 (60 L. Ed. 453, 36 Sup. Ct. Rep. 177). Under the construction which has been placed by the federal Supreme Court on the Carmack Amendment we are clear that the defendant is chargeable with the neglect of the Denver & Rio Grande Railroad Company to notify plaintiff's assignors.

8. The defendant contends that there was error in admitting evidence of the custom of railway companies to give notice when a shipment cannot be delivered. The evidence objected to tended only to charge the defendant with the duty devolving upon it under the law, and its admission was therefore harmless error, if error at all.

9. The defendant strenuously contends that it was the duty of plaintiff's assignors to be present at Hotchkiss to receive the goods. Many of the authorities announce the doctrine that the duty of the consignee to receive and that of the carrier to deliver are correlative duties, equally binding on the parties. An examination of these authorities discloses the fact that the doctrine so announced is incidental to the determination of the question of when the liability of the carrier as an insurer terminates. It is held that the consignee cannot extend the period in which the carrier is an insurer by failure to take the goods when the carrier is ready to deliver them: 2 Hutchinson on

Carriers (3 ed.), § 723. It does not follow that the failure of the consignee to take the goods works a forfeiture or relieves the carrier of its duty to exercise due diligence in caring for them.

10. It is next contended that the bank of Hotchkiss was the agent of plaintiff's assignors, and that therefore the knowledge of the bank was the knowledge of plaintiff's assignors. Inasmuch as this bank knew that the drafts drawn on Pierce & Maternes were not taken up and the bills of lading were not surrendered it is argued that plaintiff is chargeable with this knowledge. It is alleged in the complaint that plaintiff's assignors sent the respective drafts with bills of lading attached to the Hotchkiss bank with proper instructions. These allegations are admitted by the answer. We think that the pleadings admit that the Hotchkiss bank was the agent of plaintiff's assignors: 3 R. C. L., pp. 610, 622, 624; 1 Mechem on Agency (2 ed.), §§ 332, 333, 337; 31 Cyc. 1597; *Bank of Washington* v. *Triplett*, 1 Pet. (U. S.) 25; (7 L. Ed. 37); *Wilson* v. *Smith*, 3 How. (U. S.) 763, 769, 770 (11 L. Ed. 820).

"It is a familiar and well-settled rule that, as to third parties, notice to an agent while acting within the scope of his authority is notice to the principal. But it is equally as well settled that such notice, in order to bind the principal, must relate to the business or transaction in reference to which the agent is authorized for and on behalf of his principal, and to matters over which his authority extends: Story on Agency, § 118; Mechem on Agency, § 718. If it relates to a matter over which the agent has no authority, and concerning which he is not authorized to act for his principal, although he may be an agent for other purposes, it will not affect the principal or be binding on him": *Pennoyer* v. *Willis*, 26 Or. 8 (36 Pac. 568, 46 Am. St. Rep. 594).

The authority of the Hotchkiss bank extended only to the collection in each case of the draft and the surrender of the bill of lading. It had no physical control over the goods or authority to deliver them. There is no evidence that it had any knowledge as to the whereabouts of the freight and if it had, such knowledge cannot be imputed to plaintiff's assignors because it would be without the scope of the agency. The goods should not have been delivered by the terminal carrier without surrender of the bill of lading, but our attention has been directed by the authorities cited in the briefs of these parties to a number of cases where goods have been delivered by the carrier without demanding the bill of lading. See, for example, *Georgia etc. R. Co.* v. *Blish Milling Co.*, 241 U. S. 190 (60 L. Ed. 948, 36 Sup. Ct. Rep. 541). It may be that the knowledge imputable to plaintiff's assignors that the drafts were unpaid and the bills of lading unsurrendered was enough to create suspicion in their minds that the goods had not been delivered, but we think the doctrine of constructive notice is inapplicable to this case. The defendant's connecting carrier neglected to notify the shippers. It cannot excuse its neglect by showing that they could have secured the information in question by inquiry from someone else. If the shipper has actual knowledge of the nondelivery of the shipment the carrier will be absolved from liability: 2 Hutchinson on Carriers (3 ed.), § 721; *Manhattan etc. Co.* v. *Chicago etc. R. Co.*, 9 App. Div. 172 (41 N. Y. Supp. 83, 85); *Wien* v. *New York etc. R. Co.*, 166 App. Div. 766 (152 N. Y. Supp. 154). This is as far as the authorities go.

11. The defendant asked a directed verdict as to the third count in the complaint, on the ground that no claim had been presented with reference to the ship-

ment covered by this count until April 22, 1913. The bill of lading in question provided that:

"Claims for loss, damage or delay must be made in writing to the carrier at the point of delivery or at the point of origin within four months after delivery of the property, or in case of failure to make delivery, then within four months after a reasonable time for delivery has elapsed. Unless claims are so made the carrier shall not be liable."

It is true that no formal bill stating in dollars the damages of plaintiff's assignors was presented to the defendant until April 22, 1913, but under date of December 19 and December 22, 1912, the defendant was notified in writing that plaintiff's assignors had such a claim and insisted upon its payment. These letters were specific as to the shipment in question and gave defendant the preliminary information necessary to a proper investigation of the facts. These letters were a sufficient assertion of the claim within the construction placed upon the clause in question by the federal Supreme Court: *Georgia Co.* v. *Blish Milling Co.,* 241 U. S. 190 (36 Sup. Ct. Rep. 541, 545).

12. The defendant challenges the correctness of the instruction given by the lower court on the measure of damages:

"If you find for plaintiff, the measure of damages for you to determine from the evidence should be the difference between the market value of the goods at Hotchkiss, Colorado, at the time the owner should have been notified of their arrival and non-delivery if due care had been taken, and the market value the goods had at same place at or about the time the shipper did receive such notice and was offered opportunity to receive the goods. You will ascertain the value, the market value of the goods at Hotchkiss, Colorado, at the time when the plaintiff's predecessors should have had notice of the non-delivery, and ascer-

tain the value of the goods when the shippers were actually informed that the goods had been received and not delivered and the difference in those values would be the measure of damages, if you find defendant was negligent under the instructions heretofore given and that the plaintiff is entitled to damages and from the amount you thus arrive at if you find for the plaintiff you will deduct the amount it is admitted was paid to the plaintiff's predecessors and state that balance in your verdict."

It is contended that this instruction is error because there was no evidence in the record as to the market value of the box shooks at the time when notice was given plaintiff's assignors. The record sufficiently shows the market value of the shooks at the time when they were shipped, but it appears affirmatively that there was no market for them subsequent to September 15, 1912. The case of *Hardin Grain Co.* v. *Chicago etc. R. Co.*, 134 Mo App. 681 (114 S. W. 1117, 1118) sustains the defendant's contention that it is error to instruct the jury to measure damages by the market value when there is no evidence of market value. A careful reading of the foregoing instruction given by the lower court indicates that the court corrected himself as to the point in question and that the jury must have understood that the measure of damages would be the difference between the market value of the goods when plaintiff's predecessors should have had notice, and their value when notice was actually given. There was but little evidence in the record tending to show what was the value of the goods when notice was given. One of plaintiff's witnesses testified that they had some value, but the only testimony tending to fix this value in dollars is the amount which was secured for the box shooks when sold under the direction of the Denver & Rio Grande Railroad Company in 1913. It

is apparent from the verdict that the jury gave credit for this amount and we think, therefore, that the error, if any, in the instruction of the court, was harmless within the rule announced in *Lemler* v. *Bord,* 80 Or. 224, 228–230 (156 Pac. 427, 1034).

13. There remains a single question. It is alleged in the answer:

"That it was the shipper's intention that Pierce & Maternes should have at least ten days to take up the bill of lading after the arrival of the car, for it notified both Pierce & Maternes and the bank that a discount of two per cent would be allowed if the draft were paid within ten days."

As to the first, second and fourth counts in the complaint, the testimony sustains this allegation. It clearly appears that the three cars of shooks referred to in these counts were sold on a contract under which Pierce & Maternes were allowed ten days in which to make payment, and were given a cash discount of 2 per cent if they paid within that time. As to the fifth count, while the allegation is identical the proof is that the purchasers were allowed 60 days' time within which to make payment. The defendant is, of course, limited to its allegations and cannot avail itself of proof unsupported by its pleading. The record, therefore, would seem to show that Pierce & Maternes were allowed 10 days within which to pay the drafts and take up the bills of lading for the cars reaching Hotchkiss August 12th, 14th and 23d and September 4th. The terminal carrier was not chargeable with neglect in failing to notify the shipper until after the expiration of the 10 days in question. As to the cars reaching Hotchkiss August 12th, 14th and 23d, it was competent for the jury to find that a notice given the shipper at the expiration of 10 days from the arrival

of the cars would have averted the loss, but such a conclusion cannot have been reached by the jury with reference to the car which reached Hotchkiss on September 4th. The evidence is that the market broke in the middle of September; it would have taken at least two days for a notice by mail to reach plaintiff's assignors.

14. We think it clear, therefore, that defendant was entitled to prevail as to the cause of action set up in the fourth count of the complaint. If the defendant had moved for a directed verdict as to this count, its motion would have been well taken. No such motion was made, nor was the question otherwise raised in the Circuit Court. This court is exercising appellate jurisdiction; its province is to review questions raised in the lower court; unless questions are raised there they are not reviewable here: *United States Mortgage Co.* v. *Marquam,* 41 Or. 391, 405 (69 Pac. 41); *State* v. *Anderson,* 10 Or. 448; *State* v. *Abrams,* 11 Or. 169 (8 Pac. 327).

On the whole case the record fails to show reversible error and the judgment is affirmed. AFFIRMED.

Argued January 31, reversed February 27, rehearing denied June 6, 1917.

NOBLE *v.* WATROUS.*

(163 Pac. 310; 165 Pac. 349.)

Taxation—Tax Title—Burden of Proof.

1. Except as the statute relieves him of the burden, a party asserting a tax title must show a compliance with the statute in each step leading up to the execution of his deed.

*For cases passing upon reimbursement of taxes paid by purchaser as condition of equitable relief against invalid tax title, see note in L. R. A. 1915C, 492. REPORTER.

Taxation—Tax Title—Assessment.

2. Section 3127, B. & C. Comp., providing that a tax deed shall be *prima facie* evidence, shifts the burden of proof, but does not validate a tax title based on an insufficient assessment.

Taxation—Tax Title—Assessments—Description of Land.

3. Under Section 2770, Hill's Ann. Laws 1892, requiring that the assessment-roll contain a description of each parcel of land to be taxed, a tax title based on two assessments respectively describing the land as "W.^{2} of N. E.^{4}" and "W.½ of N. E.^{4}" of a certain section, township and range was invalid.

Taxation—Tax Title—Suit—Costs—Taxation.

4. Where in an action to quiet title it appears that the former owner abandoned the land more than twenty years before suit, that plaintiff secured a deed from her for a nominal consideration immediately prior to suit, that defendant purchased a tax title believing it unquestioned and paid the full value of the land, and for nearly twenty years paid taxes on the property, improving it, and exercising some dominion over it, though insufficient to satisfy the statute of limitations, and that the trial of the present suit was delayed nearly eight years, costs will be allowed to defendant in both courts on reversal of a decree for defendant and rendition of a decree for plaintiff.

Taxation—Tax Title—Suit—Conditional Decree—Reimbursement for Taxes Paid.

5. Where it further appears in such case that defendant has paid taxes on the property during pendency of suit, the decree for plaintiff should be conditioned on his paying into court the money necessary to reimburse defendant for such taxes, with lawful interest thereon.

ON PETITION FOR REHEARING.

Taxation—Assessment—Description of Property.

6. Section 2774, Hill's Ann. Laws 1892, providing that it should be sufficient to describe lands in all proceedings relative to assessing them for taxes by initial letters, abbreviations and figures to designate the township, range, section or part of a section, did not authorize the use of the exponents ^{2} and ^{4} to designate half and quarter sections, though thereunder the initial letters "N. E." would be accepted as the equivalent of northeast, "Sec." as section, and the figures ¼ as one fourth.

Appeal and Error—Supplemental Record—Filing After Decision.

7. Leave to file a supplemental record to correct an error in the transcript on file will not be granted, after the case has been decided and a petition for rehearing has been filed, where it could not lead to any different determination of the appeal.

Taxation—Tax Deed—Presumptions and Burden of Proof.

8. Under Section 3127, B. & C. Comp., providing for the issuance of a deed to the purchaser at a tax sale, and that such deed shall be *prima facie* evidence of certain facts as to the assessment and sale, such presumptions of regularity attach only to a deed in favor

of the purchaser, and do not attach in favor of a deed to an assignee of the certificate of sale.

[As to effect of recitals in tax deeds, see note in 31 Am. St. Rep. 233.]

Taxation—Delinquent Tax-roll—Description of Property.

9. That a delinquent tax-roll did not show whether the range in which the property lay was east or west was a fatal defect.

Taxation—Tax Sale—Time of Sale.

10. Under Section 2814, Hill's Ann. Laws 1892, requiring the warrant for the collection of delinquent taxes to be issued within ten days after the first Monday in April, and to be returnable on the first Monday in July, Section 2815, under which the warrant, when issued, had the force and effect of an execution, and Section 278, under which the life of an execution, unless prolonged in some way, was sixty days, where a warrant was not issued until July 27th, and the sale did not take place until November 29th, the warrant was *functus officio*, and the sale thereunder was void.

From Washington: HENRY L. BENSON, Judge.

Suit by H. E. Noble, against J. Arthur Watrous and —— Watrous, his wife, Sherman Bacon and —— Bacon, his wife, to quiet title. From a decree in favor of defendants, plaintiff appealed. Reversed.

Department 2. Statement by MR. JUSTICE MCCAMANT.

This is a suit brought to quiet the title to the west half of the northeast quarter of section 13, T. 3 N., R. 4 W., in Washington County. Both parties claim under Florence E. Watts, who was admittedly the owner of the property in 1895 and 1896. Plaintiff claims under a deed in his favor executed by Mrs. Watts and her husband December 14, 1905. The defendants claim under tax sales held for the purpose of enforcing the lien of the taxes levied for the years of 1895 and 1896. The property was purchased at these tax sales by the defendant Watrous, who conveyed to the defendant Bacon. From a decree for defendants, plaintiff prosecutes this appeal.

REVERSED. REHEARING DENIED.

For appellant there was a brief over the names of *Messrs. Wood, Montague & Hunt* and *Mr. John M. Wall,* with an oral argument by *Mr. Richard W. Montague.*

For respondents there was a brief over the names of *Mr. Edmund B. Tongue* and *Mr. Thomas H. Tongue,* with an oral argument by *Mr. Edmund B. Tongue.*

MR. JUSTICE MCCAMANT delivered the opinion of the court.

1. It is settled law in this jurisdiction that tax titles are not favored. Except as the statute relieves him of the burden, the party asserting a tax title must show a compliance with the statute in each of the steps leading up to the execution of his deed: *Rafferty* v. *Davis,* 54 Or. 77 (102 Pac. 305); *Ayers* v. *Lund,* 49 Or. 303, 307 (89 Pac. 806, 124 Am. St. Rep. 1046). The defendant Bacon, who is asserting the tax titles, relies on Section 3127, B. & C. Comp. This section of the Code, which was in force when the tax deed in favor of this defendant was executed, provides in part that a deed executed in conformity with its provisions

"shall be *prima facie* evidence in all the courts of this state in all controversies relating to the rights of the purchaser, or his heirs or assigns, to the land thereby conveyed, of the following facts: (1) That the real property conveyed was subject to tax for the year or years stated in the deed; (2) that the taxes were not paid at any time before the sale; (3) that the real property conveyed has not been redeemed from the sale at the date of the deed; (4) that the property had been listed and assessed; (5) that the taxes were levied according to law; (6) that the property was duly advertised for sale; (7) that the property was sold for taxes as stated in the deed:—and it shall be conclusive evidence of the following facts: (1) That the manner in

which the listing, assessment, levy, notice, and sale were conducted was in all respects as the law directed; (2) that the grantee named in the deed was the purchaser; (3) that all the prerequisites of law were complied with by all the officers who had, or whose duty it was to have had, any part or action in any transaction relating to or affecting the title conveyed, or purporting to be conveyed, by the deed from the listing and valuation of the property up to the execution of the deed, both inclusive, and that all things whatsoever required by law to make a good and valid sale, and to vest the title in the purchaser were done, except in regard to the points named in this section wherein the deed shall be presumptive evidence only."

2, 3. This legislation shifts the burden of proof, but does not operate otherwise to validate a tax title based on an insufficient assessment. In the absence of a valid assessment there can be no transfer of title through a tax sale. The assessment for the year 1895 describes the land as W.^{2} of N. E.^{4} Section 13 Township 3 N. Range 4 West. The assessment for 1896 uses the following description: W. ½ of N. E.^{4} Section 13 Township 3 N. Range 4 West. It has been repeatedly held that an exponent *two* is not effectual to designate a half-section and an exponent *four* will not designate a quarter-section: *Power* v. *Bowdle,* 3 N. D. 107 (54 N. W. 404, 44 Am. St. Rep. 511, 21 L. R. A. 328); *State Finance Co.* v. *Mulberger,* 16 N. D. 214 (112 N. W. 986, 125 Am. St. Rep. 650); *Farmers' Bank* v. *Martin,* 29 N. D. 269 (150 N. W. 572, L. R. A. 1915D, 432); Black on Tax Titles (2 ed.), § 114; 1 Cooley on Taxation, 748, note; 37 Cyc. 1059, note.

We have been cited to no authority to the contrary, nor have we been able to find any. This record contains no testimony to the effect that such exponents are customarily used to designate half and quarter sec-

tions. It was expressly required by the statute in force when this assessment was levied that the assessment-roll should contain a description of each parcel of land to be taxed: Section 2770, Hill's Ann. Laws. We are therefore constrained to hold that these assessments are insufficient as the basis of the said defendant's title. We may add that there are other grounds on which these tax titles are attacked and we are by no means clear that they could be upheld even if the assessments were valid.

4. It appears from the record that Florence E. Watts, the former owner of the property, abandoned it more than twenty years ago and that plaintiff secured a deed from her for a nominal consideration immediately prior to the bringing of this suit. On the other hand, the defendant Bacon purchased from the defendant Watrous in the belief that the title was unquestioned and paid full value for the land. For nearly twenty years the defendants have paid the taxes on the property. While the evidence fails to show such a possession of the property by the defendant Bacon as would satisfy the statute of limitations or defeat plaintiff's right to maintain this suit, it does show the exercise of dominion over the property from time to time by the defendant Bacon and some improvement of the property by him without protest from anyone. This suit was brought March 20, 1906; it was not tried until February 18, 1914. In view of the circumstances above recited, the defendant Bacon will recover costs in both courts.

5. In response to an order passed by the lower court plaintiff has paid into that court the moneys necessary to reimburse the defendants for taxes paid by them prior to the bringing of this suit. His relief should be conditioned on the further payment to the defendant

Bacon of the amounts paid by the latter for taxes on the property during the pendency of this suit, with lawful interest thereon. Subject to this condition, plaintiff is entitled to a decree quieting his title against the defendants.

The decree of the lower court is reversed.

REVERSED. REHEARING DENIED.

MR. CHIEF JUSTICE MCBRIDE, MR. JUSTICE MOORE and MR. JUSTICE BEAN concur.

Denied June 6, 1917.

ON PETITION FOR REHEARING.

(165 Pac. 349.)

Petition for rehearing. Denied.

Mr. Edmund B. Tongue and *Mr. Thomas H. Tongue*, for the petition.

Messrs. Wood, Montague & Hunt and *Mr. John M. Wall, contra.*

Department 2. MR. JUSTICE MCCAMANT delivered the opinion of the court.

A petition for rehearing has been filed by the defendant Bacon and we have re-examined the questions involved in this case. The petition calls our attention to the cases of *Oregon R. Co.* v. *Umatilla County*, 47 Or. 198 (81 Pac. 352), and *Martin* v. *White*, 53 Or. 319 (100 Pac. 290). In each of these cases the record shows an assessment in which quarter-sections are undertaken to be indicated by the exponent 4, and half

sections, by the exponent 2. The former of these cases was an attack by writ of review upon an order of the County Court of Umatilla County levying a tax on the property of plaintiff. On page 208 of the opinion the court suggested that the description was not as certain and definite as it should be, and that it was probably not sufficient to support a title acquired at a tax sale. In the case of *Martin* v. *White* the description was held to be insufficient on other grounds. Neither of these authorities tends to support the sufficiency of the descriptions referred to in the former opinion.

6. Our attention is directed to Section 2774 of Hill's Code, which was in force when the assessments were made on which the tax title is based. This section is as follows:

"It shall be sufficient to describe lands, in all proceedings relative to assessing, advertising, or selling the same for taxes, by initial letters, abbreviations, and figures to designate the township, range, section, or part of a section, and also the number of the lots and blocks."

Under this statute the initial letters *N. E.* may be accepted as the equivalent of Northeast, and *Sec.*, as a satisfactory abbreviation of Section. It is not necessary to spell out one-fourth; the figures ¼ are a sufficient designation. This is as far as the statute goes. In his petition for a rehearing the defendant Bacon cites many authorities to sustain his contention that the description in question is sufficient. *Atkins* v. *Hinman*, 7 Ill. 437, is the only one of them which involved a description in which a quarter-section was designated by the figure 4. While the description in that case was upheld as sufficient, the attention of the court was not directed to this point, the attack being based on other

grounds. We have found no case in which a court has squarely decided that such a description is sufficient. The text-books pronounce it fatally defective for purposes of assessment and taxation. For additional authorities to this effect see: *Keith* v. *Hayden,* 26 Minn. 212 (2 N. W. 495); *Turner* v. *Hand County,* 11 S. D. 348 (77 N. W. 589); *Stokes* v. *Allen,* 15 S. D. 421 (89 N. W. 1023); *Moran* v. *Thomas,* 19 S. D. 469 (104 N. W. 212).

7. The petition states that the original assessment-roll for the year 1896 does not describe the property in the manner indicated in the opinion, and leave is asked to file a supplemental record here to correct the error in the transcript on file. It was held in *State* v. *Jennings,* 48 Or. 483, 494 (89 Pac. 421), that the record in this court cannot be corrected after the case has been decided and a petition for rehearing has been filed. The application for correction in that case was made by an appellant. If we shall assume that a different rule should apply in this case, inasmuch as the application is made by a respondent, the application should be denied because it could not lead to any different determination of the appeal.

8. When the property in question was sold for the payment of the 1896 taxes, the defendant Watrous was the purchaser. There was no deed issued to him, and the only deed which appears in the record is a deed executed to the defendant Bacon as his assignee after this suit was brought. The statute in force at that time made no provision for such a case. The only tax deed authorized by it was a deed in favor of the purchaser at the tax sale. It has been held that a tax deed issued in favor of a grantee not expressly entitled by the statute to receive it is void: *Alexander* v. *Savage,* 90 Ala. 383 (8 South. 93); *Capehart* v. *McGahey,* 132 Ala. 334 (31 South. 503); *Sanders* v. *Ransom,* 37 Fla. 457 (20

South. 530); *Territory* v. *Perea,* 6 N. M. 531 (30 Pac. 928). On the other hand, there is respectable authority that such a deed can issue: 1 Blackwell on Tax Titles (5 ed.), 632; 37 Cyc. 1423. It is unnecessary in this case to determine the question of law arising on this conflict in the authorities. Under the statute in effect when the deed was made, Section 3127, B. & C. Code, the presumptions as to regularity referred to in our former opinion can attach only to a deed in favor of the purchaser. This is the plain language of the statute and we cannot extend its meaning by construction. Any statute which precludes a party from alleging and proving the truth should be strictly construed, and such construction is called for where, as in this case, a tax title is involved.

9. In so far as the defendant Bacon relies on the sale for the taxes of 1896, there are no presumptions in his favor, and the burden devolved upon him to show a compliance with the statute in all respects. He has not sustained this burden. It appears affirmatively that the delinquent tax-roll does not show whether the range in which the property lies is east or west. This has been held a fatal defect in description: *Sears* v. *Murdock,* 59 Or. 211, 213 (117 Pac. 305).

Under Section 2814 of Hill's Code, which was in force at the time, the warrant for the collection of delinquent taxes should have issued within ten days after the first Monday in April, 1897, and should have been returnable on the first Monday in July, 1897. The warrant did not issue until July 27, 1897, and the sale did not take place until November 29, 1897. It has been held that the requirements of the statute as to the time of issuing and returning the warrant are matters of substance and if the statute is not complied with in these respects the tax title must fail: *Shimmin* v. *Inman,* 26 Me. 228;

Pinkham v. *Morang,* 40 Me. 587; *Jenkinson* v. *Auditor General,* 104 Mich. 34 (62 N. W. 163).

10. Under Section 2815 of Hill's Code the warrant when issued had the force and effect of an execution. The life of an execution, unless prolonged in some way not involved here, was sixty days: Section 278, Hill's Code.

This court has held that a stricter compliance with the law is required in tax sales than in sales under execution: *Walton* v. *Moore,* 58 Or. 237, 240 (114 Pac. 105). It is clear that the warrant under which the property was sold was *functus officio* on the day of sale: 10 R. C. L. 1269.

The petition for rehearing admits that the designation of the half section by the exponent *2,* and the quarter-section by the exponent *4,* appears in the tax-roll for 1896 and in the certificate of sale issued in favor of the defendant Watrous. On all of these grounds we are clear that the tax title must fail.

The title of the defendant Bacon is attacked on still other grounds. There are no dollar-marks in the tax-roll for 1896. The value of the property is listed as 200 and the tax as 300. These figures are not qualified by decimal marks or separated by lines as in the judgment docket involved in *De Lashmutt* v. *Sellwood,* 10 Or. 319, 324. It has been held by the federal court for Oregon that this is a fatal defect: *Tilton* v. *Oregon Cent. etc. Road Co.,* Fed. Cas. No. 14,055, 3 Sawy. 22, 24; and the holding of the California court is to the same effect: *Hurlbutt* v. *Butenop,* 27 Cal. 50, 57; *People* v. *San Francisco Sav. Union,* 31 Cal. 132; *Emeric* v. *Alvarado,* 90 Cal. 444, 466, 467 (27 Pac. 356). These decisions have been somewhat criticised and it is not necessary in deciding this case to determine whether the principle they announce is the law. The title of

the defendant Bacon is doubtful on this latter ground, and clearly bad on the other grounds above noted.

The petition for rehearing strongly emphasizes the circumstances alluded to in the concluding portion of our former opinion. The position of the defendant Bacon is indeed one of hardship, but it is the province of the court to declare the law. Under the law plaintiff is entitled to prevail and we are obliged to enter a decree as outlined in our former opinion.

FORMER OPINION APPROVED. REHEARING DENIED.

MR. CHIEF JUSTICE MCBRIDE, MR. JUSTICE MOORE and MR. JUSTICE BEAN concur.

Submitted on briefs May 7, affirmed June 6, 1917.

KING v. OREGON SHORT LINE R. CO.

(165 Pac. 349.)

Appeal and Error—Abstract of Record—Assignments of Error—Necessity for.

1. Where the abstract on appeal contains no assignments of error and the complaint states a cause of action, questions discussed in appellant's brief will not be considered.

From Malheur: DALTON BIGGS, Judge.

Action by Arthur S. King against the Oregon Short Line Railroad Company, a corporation. From a judgment in favor of plaintiff, defendant appealed.

Submitted on briefs under the proviso of Supreme Court Rule 18: 56 Or. 622 (117 Pac. xi). Affirmed.

In Banc. Statement by MR. JUSTICE MCCAMANT.

This is an action brought to recover the value of a cow alleged to have been killed by the defendant's

negligence. The action was brought originally in a Justice Court in Malheur County. The defendant took the case on appeal to the Circuit Court, where the case was tried *de novo* and a verdict was recovered by plaintiff for seventy-five dollars, interest and costs. Defendant appeals from a judgment entered on this verdict. AFFIRMED.

For appellant there was a brief over the names of *Mr. George H. Smith, Mr. H. B. Thompson* and *Mr. William E. Lees.*

For respondent there was a brief submitted by *Mr. Leslie J. Aker.*

MR. JUSTICE MCCAMANT delivered the opinion of the court.

Plaintiff calls attention to the absence of assignments of error in the abstract on appeal. Under the authority of *Salene* v. *Isherwood,* 74 Or. 35, 39 (144 Pac. 1175), and *Dundas* v. *Grand View Land Co.,* 79 Or. 379, 380 (155 Pac. 365), this condition of the record precludes the consideration of the questions discussed in appellant's brief. We find that the complaint states facts sufficient to constitute a cause of action. The judgment is affirmed. AFFIRMED.

Argued May 8, modified June 6, 1917.

STATE LAND BOARD *v.* LEE.*

(165 Pac. 372.)

Limitation of Actions—Statutes—Applicability to State.

1. It is a rule that the government is not included in a general statute of limitations unless expressly or by necessary implication included.

Limitation of Actions—Statutes—Applicability to State.

2. Although the state is not named, if it appears that it is the real party in interest, a limitation statute which does not expressly or by necessary implication include the state will not be permitted to operate.

Constitutional Law—Obligation of Contracts—State.

3. The state, like a private person, is prohibited from impairing the obligation of a contract entered into by it.

Constitutional Law — Impairing Obligation of Contracts — Statute of Limitation.

4. A pure statute of limitation affects the remedy, and not the debt, and does not impair any obligation imposed by contract.

[As to the general theory and policy of the statute of limitation, see note in 95 **Am. St. Rep.** 656.]

Limitation of Actions—Statutes—Applicability to State—"Real Party in Interest."

5. Under Laws 1913, pages 580, 581, Sections 1, 2, 3, providing that no mortgage upon real estate heretofore or hereafter given shall be a lien or encumbrance after the expiration of ten years, etc., does not apply to the foreclosure by state land board of a mortgage given to secure moneys borrowed from the irreducible school fund; the state being the real party in interest, although proceedings are in the name of the state land board.

From Union: JOHN W. KNOWLES, Judge.

In Banc. Statement by MR. JUSTICE HARRIS.

This is a suit to foreclose a note and mortgage given to the state land board by George H. Osborn and his wife Mary E. Osborn. The note is dated October 13, 1902, recites that it is for $700 "borrowed on account

*As to applicability of statute of limitations to action by agencies of state, see notes in 3 **L. R. A. (N. S.)** 746; 22 **L. R. A. (N. S.)** 921; **L. R. A.** 1916E, 96.

As to the immunity of the state from the statute of limitations and laches, see title "Limitations of Actions," 17 **R. C. L.**, Sections 344, 345. REPORTER.

of the irreducible school fund," bears interest at the rate of 6 per cent per annum, and by its express terms became due "one year after date." The note was secured by a mortgage on 480 acres of land in sections 10 and 15 of a designated township. No payments were made on the principal of the note. Payments were made on the interest from time to time, the last payment being on March 19, 1913, when the interest was satisfied to August 5, 1912.

The land in section 15 was conveyed to E. T. Kaster and C. J. Forsstrom on August 7, 1911, while the remainder of the mortgaged premises was acquired by Ed Lee and F. M. Lee prior to December 20, 1915, when this suit was commenced by the state land board. The present owners of the land purchased with notice of the mortgage; and hence if the mortgage is enforceable against the mortgagors it is likewise enforceable against the subsequent purchasers of the land.

The defendants resisted the attempt to foreclose the mortgage by interposing Chapter 304, Laws 1913. The statute reads thus:

"Section 1. No mortgage upon real estate now, heretofore or hereafter given, shall be a lien or encumbrance, or of any effect or validity for any purpose whatsoever, after the expiration of 10 years from the date of the maturity of the obligation or indebtedness secured or evidenced by such mortgage, or from the date to which the payment thereof has been extended by agreement of record. If the date of the maturity of such obligation or indebtedness is not disclosed by the mortgage itself, then the date of the execution of such mortgage shall be deemed the date of the maturity of the obligation or indebtedness secured or evidenced by such mortgage.

"Section 2. After 10 years have elapsed from the date of maturity of any mortgage upon real estate, as herein provided in section 1 of this act, such mortgage

shall conclusively be presumed to be paid, satisfied and discharged, and no action, suit or other proceeding shall be maintainable for the foreclosure of the same.

"Section 3. This act shall not take effect until the first day of January, A. D. 1914; after which date the same shall be in full force."

The trial court awarded a judgment against the makers of the note for the principal and interest due, an attorney's fee and costs and disbursements; but a decree foreclosing the mortgage was refused on the theory that the lien of the mortgage was released on January 1, 1914. The state land board appealed.

MODIFIED.

For appellant there was a brief over the names of *Mr. Colon R. Eberhard, Mr. George M. Brown,* Attorney General, and *Mr. Isaac H. Van Winkle,* Assistant Attorney General, with oral arguments by *Mr. Eberhard* and *Mr. Brown.*

For respondents there was a brief over the names of *Mr. Charles H. Finn* and *Mr. R. J. Kitchen,* with an oral argument by *Mr. Finn.*

MR. JUSTICE HARRIS delivered the opinion of the court.

It is conceded that the payment of interest tolled the statute of limitations as against the note and that therefore the plaintiff is entitled to a judgment for whatever sums may be due on the note: Section 25, L. O. L. The defendants contend, however, that Chapter 304, Laws 1913, bars the plaintiff from enforcing the lien of the mortgage. The parties did not make any agreement of record extending the time for payment; more than 10 years expired from the date of the

maturity of the note before the commencement of this suit; and hence the mortgage cannot be foreclosed if Chapter 304, Laws 1913, is available to the defendants, although the note which the mortgage was designed to secure can be reduced to a money judgment. The question for final decision is whether the statute applies to mortgages given to secure moneys borrowed from the irreducible school fund. The defendants argue that Chapter 304 is a statute of limitation and that the language of the enactment is sufficiently comprehensive to embrace mortgages given to the state land board to secure money borrowed from the irreducible school fund. The plaintiff contends that this is in reality a suit by the state and that if Chapter 304 is assumed to be a statute of limitation, it does not embrace the state for the reason that the state is neither expressly mentioned nor included by necessary implication.

1. Stated in broad terms, it is a rule of universal recognition that the government is not included in a general statute of limitation unless it is expressly or by necessary implication included. This rule is said to be founded upon the legal fiction expressed in the maxim *nullum tempus occurrit regi.* However, it is not necessary to predicate this salutary precept upon any fiction, since sound reason for the rule is found in the fact that as a matter of public policy it is necessary to preserve public rights, revenues and property from injury and loss by the negligence of public officers: *State* v. *Warner Valley Stock Co.,* 56 Or. 283, 308 (106 Pac. 780, 108 Pac. 861); *United States* v. *Nashville, C. & St. L. Ry. Co.,* 118 U. S. 120 (30 L. Ed. 81, 6 Sup. Ct. Rep. 1006); *Catlett* v. *People,* 151 Ill. 16 (37 N. E. 855); *State* v. *Fleming,* 19 Mo. 607; *Blazier* v. *Johnson,* 11 Neb. 404 (9 N. W. 543); *Gibson* v. *Chou-*

teau, 13 Wall. (U. S.) 92 (20 L. Ed. 534); *State* v. *School Dist.,* 34 Kan. 237 (8 Pac. 208); Buswell on Limitations and Adverse Possession, § 97; 19 Am. & Eng. Enc. Law (2 ed.), 188; 25 Cyc. 1006; 36 Cyc. 1171.

For the purpose of avoiding the common-law rule exempting the government from limitation statutes the legislature passed a statute in 1862 which provided that:

"The limitations prescribed in this title shall apply to actions brought in the name of the state, any county or other public corporation therein, or for its benefit, in the same manner as to actions by private parties": Section 13, Deady's Code.

This statute remained unchanged until 1903, when the legislature amended it so as to read thus:

"The limitation prescribed in this title shall not apply to actions brought in the name of the state, or any county, or other public corporation therein, or for its benefit * * ": Section 13, L. O. L.

Another section provided that a suit shall only be commenced within the time limited to commence an action: Section 391, L. O. L. From 1862 until 1903, statutes of limitation applied to the state and private persons alike, for the sole reason that the state acting through its legislature had expressly consented that limitation statutes be made applicable to the commonwealth.

That the legislature recognized the existence of the common-law rule exempting the government is conclusively proved by the passage of the act of 1862, because if the common-law rule did not at that time prevail in this jurisdiction, then the enactment of the statute of 1862, so far as made applicable to the state, was a work of supererogation; and, moreover, whenever the courts applied the bar of a statute of limitation to an action

prosecuted by the state they did so only because the limitation statute had been made applicable to the state by an express legislative enactment: *State* v. *Baker County,* 24 Or. 141, 146 (33 Pac. 530); *Schneider* v. *Hutchinson,* 35 Or. 253, 254 (57 Pac. 324, 76 Am. St. Rep. 474); *Wallowa County* v. *Wade,* 43 Or. 253, 260 (72 Pac. 793); *State* v. *Portland Gen. Elec. Co.,* 52 Or. 502, 515 (95 Pac. 722, 98 Pac. 160); *State* v. *Warner Val. Stock Co.,* 56 Or. 283, 308 (106 Pac. 780, 108 Pac. 861); *Silverton* v. *Brown,* 63 Or. 418, 424 (128 Pac. 45); *State* v. *Warner Val. Stock Co.,* 68 Or. 466, 471 (137 Pac. 746). Had the legislature merely repealed Section 13 in 1903, the repeal would of itself have restored the common-law rule which had been suspended since 1862; *State ex rel. Goodman* v. *Halter,* 149 Ind. 292 (47 N. E. 665); but the common-law rule was first revived and then reinforced by an express legislative declaration that statutes of limitation shall not apply to actions brought in the name of the state or for its benefit. The history of Section 13 is helpful in ascertaining the legislative purpose concerning the statute of 1913. In 1862 the state adopted the policy of submitting itself to limitation statutes, but subsequently in 1903 the state concluded that a different policy would be better and accordingly declared that it would no longer submit itself to limitation statutes. Chapter 304, Laws 1913, does not contain any words expressly including the state nor does its language necessarily imply that the state is included. When viewed in the light of the previously declared policy of the state the act of 1913 is devoid of any suggestion whatever and much less a necessary implication that the state is included.

2. Although the state is not a party plaintiff *eo nomine,* nevertheless, if the suit is in truth for the benefit of

the state and if it is the real party in interest a statute of limitation will not operate against the commonwealth. Even in the absence of a statute like Section 13, L. O. L., the court will examine the record and if it appears that the state is the real party in interest, a limitation statute which does not expressly or by necessary implication include the government will not be permitted to operate against the state: *State Bank* v. *Brown,* 2 Ill. 106; *Commonwealth* v. *Baldwin,* 1 Watts (Pa.), 54 (26 Am. Dec. 33); *Glover* v. *Wilson,* 6 Pa. St. 290; *Eastern State Hospital* v. *Graves Committee,* 105 Va. 151 (52 S. E. 837, 8 Ann. Cas. 701, 3 L. R. A. (N. S.) 746); *Black* v. *Chicago B. & Q. R. Co.,* 237 Ill. 500 (86 N. E. 1065); *People* v. *Kerber,* 152 Cal. 731 (125 Am. St. Rep. 93, 93 Pac. 878); *Sixth Dist. Agr. Assn.* v. *Wright,* 154 Cal. 119 (97 Pac. 144); *United States* v. *Beebe,* 127 U. S. 338 (32 L. Ed. 121, 8 Sup. Ct. Rep. 1083); *State ex rel. Goodman* v. *Halter,* 149 Ind. 292 (47 N. E. 665); *Hill* v. *Josselyn,* 13 S. & M. (Miss.) 597; *Wasteney* v. *Schott,* 58 Ohio St. 410 (51 N. E. 34).

Having determined that Chapter 304, Laws 1913, does not include the state and having concluded that if the state is the real party in interest the statute is not available to the defendants even though the state land board is the nominal plaintiff, we must now direct attention to the origin and functions of the state land board and to the history of the irreducible school fund in order to discover whether this suit is for the benefit of the state.

The act of Congress approved February 14, 1859, admitting Oregon to statehood offered to the commonwealth sections 16 and 36 in every township of public lands in the state for the use of schools. Article VIII, Section 2 of the state Constitution provides that "the proceeds of all the land which have been, or hereafter

may be, granted to this state, for educational purposes * * ; all the moneys and clear proceeds of all property which may accrue to the state by escheat or forfeiture"; and all moneys derived from other specified sources

"shall be set apart as a separate and irreducible fund, to be called the common school fund, the interest of which, together with all other revenues derived from the school land mentioned in this section, shall be exclusively applied to the support and maintenance of common schools in each school district, and the purchase of suitable libraries and apparatus therefor."

Section 3 of the same article directs the legislature to provide by law for the establishment of a uniform and general system of common schools. Section 4 commands that provision shall be made by law for the distribution of the income of the common school fund among the several counties of the state; and Section 5 so far as material here, reads thus:

"The governor, secretary of state, and state treasurer shall constitute a board of commissioners for the sale of school * * lands, and for the investment of funds arising therefrom, and their powers and duties shall be such as may be prescribed by law * * ."

By the terms of Section 3882, L. O. L., the legislature declared that the governor, secretary of state and state treasurer "are hereby made a board of commissioners for the sale of state lands, and for the investment of funds arising therefrom, and shall be styled the 'state land board.'" Section 3913, L. O. L., provides that the irreducible school fund of this state shall be composed of moneys derived from specified sources. The state land board is required by Section 3914, L. O. L., to loan all moneys belonging to the irreducible school fund, and the board is commanded

to secure such loans by notes and mortgages "to the state land board on real estate in this state." Section 3926, L. O. L., makes it the duty of the state land board to foreclose all mortgages taken to secure loans from the school fund whenever more than one year's interest is due and unpaid.

By the terms of the Constitution the governor, secretary of state and state treasurer are made a board of commissioners for the sale of school lands and for the investment of the funds arising from such lands; and the powers and duties of the board "shall be such as may be prescribed by law." The legislature has given the board a name by calling it the State Land Board and, acting on the authority of the Constitution, has prescribed the powers and duties of the board. Every power conferred upon the board and every duty imposed upon it, whether conferred or imposed by the Constitution or legislative enactment, is for the direct benefit of the state. The state land board exists for the sole purpose of serving the state. Every attribute given to it and every function performed by it is for the benefit of the commonwealth. The state land board is the land department of the state. It is not an inferior board, but it is created by the Constitution and is a co-ordinate department of the state government: *Corpe* v. *Brooks,* 8 Or. 223, 225; *Robertson* v. *State Land Board,* 42 Or. 183, 187, 189 (70 Pac. 614); *Miller* v. *Wattier,* 44 Or. 347, 351 (75 Pac. 209); *Warner Val. Stock Co.* v. *Morrow,* 48 Or. 258, 262 (86 Pac. 369); *State* v. *Warner Val. Stock Co.,* 56 Or. 283, 303 (106 Pac. 780, 108 Pac. 861); *De Laittre* v. *Board of Commrs.,* 149 Fed. 800. Manifestly, the state land board is acting for the benefit of the state and the latter is the real party in interest.

The defendants proceed with their argument by contending that even though it is assumed that the state is the real party in interest, nevertheless when the state loans money it strips itself of the prerogatives attaching to sovereignty and acts in a purely proprietary capacity, subject to all the rules governing private parties. The defendants are relying upon precedents which do not apply to the instant case. If it be assumed that the state land board is a private corporation and that the state is a mere creditor of the board, then cases like *Calloway* v. *Cossart,* 45 Ark. 81, might be available to the defendants. Cases where the state is the real party in interest are widely different from those where the state is a mere creditor of a party who is both the nominal and real party to a legal proceeding: *Bank of United States* v. *Planters' Bank,* 9 Wheat. (U. S.) 904 (6 L. Ed. 244); *Bank of United States* v. *M'Kenzie,* 2 Fed. Cas. No. 927, p. 721, 2 Brock. 393. See, however, *Glover* v. *Wilson,* 6 Pa. St. 290; *State ex rel. Goodman* v. *Halter,* 149 Ind. 292 (47 N. E. 665), and Buswell on Limitations and Adverse Possession, 150. Again, if it be assumed that, prior to the time fixed by the note as the date of its maturity, the legislature had passed a statute shortening the period for the maturity of the note, or if a law had been enacted prescribing that the interest should be paid monthly instead of semi-annually as stipulated in the note, then the defendant might be able to rely upon adjudications like: *Davis* v. *Gray,* 16 Wall. (U. S.) 232 (21 L. Ed. 447); *Hall* v. *Wisconsin,* 103 U. S. 5 (26 L. Ed. 302); *Patton* v. *Gilmer,* 42 Ala. 548 (94 Am. Dec. 665); *Chapman* v. *State,* 104 Cal. 690 (38 Pac. 457, 43 Am. St. Rep. 158); *Carr* v. *State,* 127 Ind. 204 (22 Am. St. Rep. 624, 11 L. R. A. 370, 26 N. E. 778); *People* v. *Stephens,* 71 N. Y. 527; *Boston Molasses Co.* v.

Commonwealth, 193 Mass. 387, 390 (79 N. E. 827).

3, 4. The state, like a private person, is prohibited from impairing the obligation of a contract entered into by it. A pure limitation statute does not operate upon the contract itself and hence does not impair any obligation imposed by a contract; but a statute of limitation only affects the remedy and does not act upon the debt: *Anderson* v. *Baxter,* 4 Or. 105, 113; *Kaiser* v. *Idleman,* 57 Or. 224, 228 (28 L. R. A. (N. S.) 169, 108 Pac. 193); *Sturges* v. *Crowinshield,* 4 Wheat. (U. S.) 122 (4 L. Ed. 529); *Bronson* v. *Kinzie,* 1 How. (U. S.) 311 (11 L. Ed. 143); *Waltermire* v. *Westover,* 14 N. Y. 16; 6 R. C. L. 367. Cases where, independent of any statute of limitation, the equitable defense of laches has been recognized are also distinguishable from the questions arising out of Chapter 304, Laws 1913.

5. When the state loans money belonging to the irreducible school fund it does not act in a proprietary capacity stripped of the attributes of sovereignty; but, on the contrary, it is performing a duty enjoined upon it by law and is acting for the public. The state is expressly commanded by the Constitution to provide for the establishment of a uniform and general system of common schools; and, furthermore, the Constitution commands that the school funds derived from specified sources shall be irreducible and that the interest shall be applied exclusively to the support of the common schools. The state does not loan the money for a private purpose, but the moneys are loaned in order that revenue may be obtained to educate the children, upon whom in after years will largely depend the welfare and stability of the commonwealth. This is a public purpose of the highest type. The title to the funds is vested in the state in its sovereign capacity; the state is not a mere dry trustee, but it holds the

funds in trust for the common schools of the state, and hence in trust for a public purpose; and therefore Chapter 304, Laws 1913, cannot bar the foreclosure of mortgages given to secure moneys borrowed from the irreducible school fund: *State* v. *Chadwick*, 10 Or. 423, 428; *Lawrey* v. *Sterling*, 41 Or. 518, 531 (69 Pac. 460); *Alexander* v. *Knox*, Fed. Cas. No. 170, 6 Sawy. 54, 59; *Black* v. *Chicago B. & Q. R. Co.*, 237 Ill. 500, 505 (86 N. E. 1065); *United States* v. *Beebe*, 127 U. S. 338, 342 (32 L. Ed. 121, 8 Sup. Ct. Rep. 1083); *The State ex rel. Goodman* v. *Halter*, 149 Ind. 292, 297 (47 N. E. 665); *Hill* v. *Josselyn*, 13 S. & M. (Miss.) 597; *United States* v. *Nashville etc. Ry. Co.*, 118 U. S. 120 (30 L. Ed. 81, 6 Sup. Ct. Rep. 1006).

The plaintiff is entitled to the money judgment awarded by the trial court and also to a decree foreclosing the mortgage. The decree appealed from will be modified to conform to the conclusions herein expressed. MODIFIED.

Submitted on briefs May 7, reversed June 6, 1917.

ROETHLER *v.* CUMMINGS.*

(165 Pac. 355.)

Justices of the Peace—Writ of Review—Waiver of Service of Writ.

1. Where defendant's counsel appeared at hearing in Circuit Court of writ of review proceedings to set aside justice's judgment, the justice having voluntarily made a full return of the writ by prearrangement between counsel, and filed brief and made argument, defendant's appearance was a general one, and service of the writ was waived in view of Section 63, L. O. L., providing that a voluntary appearance shall be equivalent to personal service.

Appearance—Presumption—General or Special.

2. Where the court has jurisdiction of the subject matter, defendant's appearance will be presumed to have been general, where the record fails to show that it was special.

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*As to effect of judgment obtained on unauthorized appearance by attorney, see note in 21 L. R. A. 848. REPORTER.

Appearance—What Constitutes—Statute.

3. Section 68, L. O. L., providing that defendant's voluntary appearance shall be equivalent to personal service of summons, is not limited to appearance by answer, demurrer, or motion specified in section 542 as constituting appearance, since the defendant may submit himself to the court's jurisdiction in other ways; the purpose of the latter section being to define what shall be construed such an appearance as will entitle defendant to be heard as a matter of right and to entitle him to service of papers.

Appearance—By Attorney—Effect of Unauthorized Appearance.

4. Where defendant admits right of an attorney to appear for him, and the attorney has been heard in behalf of his client, the latter is not in a favorable position to claim that appearance was unauthorized.

Certiorari—Writ of Review—Pleading.

5. In proceeding for writ of review, defendant's only pleading is a return to the writ.

Justices of the Peace—Writ of Review—Sufficiency of Petition.

6. Petition for writ of review alleging want of service of justice's summons, and no appearance by defendants, *held* sufficient to challenge the jurisdiction of the Circuit Court to render judgment thereon.

Certiorari—Writ of Review—Questions Presented.

7. A writ of review presents questions of law alone arising on the record of the inferior tribunal.

Certiorari—Writ of Review—Contradiction of Record.

8. The record of the inferior tribunal brought up on writ of review cannot be contradicted on re-examination by the reviewing court, although incorrect.

Appearance—Service of Process—Waiver of Objection.

9. Where attached property was released on defendant's bond as provided by Section 210, L. O. L., defendant's application therefor was a general appearance, gave the court personal jurisdiction instead of jurisdiction in rem, and waived irregularities in service of process.

Appearance—Nature of.

10. The character of an appearance as general or special does not depend upon the form of the procedure, but upon its substance and the relief sought.

[As to test as to whether appearance is special or general, see note in **Ann. Cas.** 1914A, 1189.]

From Baker: GUSTAV ANDERSON, Judge.

In Banc. Statement by MR. JUSTICE BEAN.

This is a proceeding for a writ of review to set aside the judgment of the Justice's Court in an action

wherein H. J. Cummings was plaintiff and Amos Roethler and David Lee were defendants. The writ was sustained by the Circuit Court and defendant Cummings appeals.

Submitted on briefs under the proviso of Supreme Court Rule 18: 56 Or. 622 (117 Pac. xi).

REVERSED. WRIT DISMISSED.

For appellant there was a brief over the name of *Mr. Orville B. Mount.*

For respondents there was a brief over the name of *Mr. James H. Nichols.*

MR. JUSTICE BEAN delivered the opinion of the court.

1. The first error assigned for consideration upon this appeal is that there was no service of the writ. It appears, however, that by prearrangement made between counsel for the respective parties the justice of the peace voluntarily made a full return to the writ, and counsel for defendant Cummings appeared at the hearing, filed a written brief, and made an argument in the Circuit Court. The service of the writ was therefore waived by defendant. Section 63, L. O. L., provides that:

"From the time of the service of the summons, or the allowance of a provisional remedy, the court shall be deemed to have acquired jurisdiction, and to have control of all the subsequent proceedings. A voluntary appearance of the defendant shall be equivalent to personal service of the summons upon him."

2, 3. In a case where the court has jurisdiction of the subject matter the appearance by the defendant will be presumed to have been general, where the record fails to show that such appearance was special: *Godfrey*

v. *Douglas County,* 28 Or. 446, 453 (43 Pac. 171). Section 542, L. O. L., is as follows:

"A defendant appears in an action or suit when he answers, demurs, or gives the plaintiff written notice of his appearance, and until he does so appear he shall not be heard in such action or suit, or in any proceeding pertaining thereto, except the giving of the undertakings allowed to the defendant in the provisional remedies of arrest, attachment, and the delivery of personal property. When the defendant has not appeared, notice of a motion or other proceeding need not be served upon him, unless he be imprisoned for want of bail, or unless directed by the court or judge thereof in pursuance of this code."

It has been held that the voluntary appearance mentioned in Section 63 is not limited nor defined by the terms of this section, as one may appear and submit himself to the jurisdiction of the court without either answering, demurring, or giving the plaintiff a written notice of his appearance; that the purpose of this section is to define what shall be construed such an appearance as will entitle a defendant to be heard as a matter of right, and to have served on him all papers which the law requires to be served: See *Belknap* v. *Charlton,* 25 Or. 41, 44 (34 Pac. 758); *Kinkade* v. *Myers,* 17 Or. 470 (21 Pac. 557); *Multnomah Lumber Co.* v. *Weston Basket Co.,* 54 Or. 22, 26 (99 Pac. 1046, 102 Pac. 1).

4. Where the right of an attorney to appear for a defendant is conceded and the former has been heard in behalf of his client, pursuant to his authority, the latter is not in a favorable position to claim that the appearance was not authorized. He should not be permitted to take advantage of an informality which his adversary has not exacted in the matter of giving written notice of appearance: *Carter* v. *Koshland,* 12 Or. 492 (8 Pac. 556).

5. In a proceeding for a writ of review the only pleading on the part of defendants is a return to the writ: *Gaston* v. *Portland*, 48 Or. 82, 85 (84 Pac 1040). It is not essential that any motion or formal plea be filed by the defendant in order to defend against the writ. In the case at bar defendant Cummings had a full hearing in the Circuit Court and all the advantage of his "day in court." His appearance was a general one and he is bound by the determination in the cause. If there was any error in the Circuit Court so proceeding with the hearing it was invited by defendant and he cannot complain.

6. The second error alleged is that the petition for the writ is insufficient. It alleges *inter alia* that the complaint and summons in the action in the Justice's Court were never served upon either of the defendants, and that there was no answer filed nor any appearance on behalf of either of them; also, that no application or motion to set aside the judgment was ever prepared or filed, as appears from the docket entries of the Justice's Court.

The petition is sufficient to challenge the jurisdiction of that court to render the judgment therein. It is therefore necessary to examine the return to the writ which discloses the procedure in the Justice's Court as follows: On August 28, 1916, a complaint was filed, summons issued, an affidavit and undertaking for an attachment were filed, and a writ of attachment issued. On August 30th, Amos Roethler personally appeared and a bond with two sureties was filed for a release of the sheep under attachment in the action and a notice to the keeper of the property of such release was issued to defendant Roethler. On September 6, 1916, a default judgment for $219.35 was entered which, when corrected, was against the

partnership of Amos Roethler and David Lee, and Amos Roethler personally, and an execution was ordered against the defendant "and their bondsmen." The docket of the Justice's Court also recites the following:

"Application to file motion to set aside judgment and vacate order of default received from James H. Nichols, attorney for defendants, September 7, 1916.

"Application to file motion to set aside judgment and vacate order of default, denied, September 30, 1916."

Section 2417, L. O. L., directs that

"actions at law in justices' courts shall be commenced and prosecuted to final determination, and judgment enforced therein, in the manner provided in the code of civil procedure for similar actions in courts of record, except as in this act otherwise provided. * * "

7, 8. A writ of review presents questions of law alone arising on the record of the inferior tribunal, and such record, though incorrect, cannot be contradicted on reexamination by the reviewing court: *Curran* v. *State,* 53 Or. 154 (99 Pac. 420); *Raper* v. *Dunn,* 53 Or. 203 (99 Pac. 889); *Gue* v. *City of Eugene,* 53 Or. 282 (100 Pac. 254); *Evans* v. *Marvin,* 76 Or. 540, 550 (148 Pac. 1119, 1121).

9, 10. Section 310, L. O. L., provides in effect that whenever the defendant shall have appeared in the action, he may apply, upon notice to the plaintiff, to the court or judge or clerk where the action is pending, for an order to discharge the attachment upon the execution of the undertaking mentioned in Section 311; and if the application is allowed, the property shall be released from the attachment and delivered to the defendant. The undertaking required is to the effect

"that the sureties will pay to the plaintiff the amount

of the judgment that may be recovered against the defendant in the action."

Such an instrument was delivered to the Justice's Court upon an application of the defendants to discharge the attachment in the proceedings in question and obligated the sureties to pay any judgment that might be rendered against the defendants. Based thereon the property of the defendants was released from the attachment. Such a procedure bound them to enter an appearance as contemplated by Section 310, L. O. L., or be proceeded against as in case of personal service. Unlike the undertaking for a redelivery or forthcoming bond provided for in Section 305, to be given to the attaching officer, the application to discharge the attachment invokes the judgment of the court upon a matter which presupposes and acknowledges the jurisdiction of such tribunal, or asks for relief which can be granted only after jurisdiction has been acquired. Such an appearance by defendants was a general one and gave the Justice's Court jurisdiction of their persons. The character of the appearance does not depend upon the form of the procedure, but upon its substance and the relief sought: *Winter* v. *Union Packing Co.*, 51 Or. 97 (93 Pac. 930); *Spores* v. *Maude*, 81 Or. 11, 17 (158 Pac. 169); *Anvil Gold Min. Co.* v. *Hoxsie*, 125 Fed. 724, 728 (60 C. C. A. 492); 4 C. J., p. 1331, § 25, where it is stated:

"The giving of a bond operating as a discharge or dissolution of an attachment or garnishment operates as an appearance converting the action from one *in rem* into one *in personam.*"

So here, by appearing and making application to the Justice's Court for a release of their property then under attachment, the defendants in effect said to the

court: "Grant our request and we will give security that we will pay any judgment that may be rendered against us in the action pending." Their pledge to the court was not that the judgment would be paid if the officer could find the defendants and make proper service of the summons upon them. They had already authorized the court to proceed in the matter. There had been an attempted service upon the agent of defendants which was of no force. This irregularity or failure was waived by defendants by the proceedings referred to. The Justice's Court having jurisdiction of the subject matter the action was thereby converted from one *in rem* into one *in personam*. The ruling in this state in this respect is in consonance with the general rule: See 4 C. J., *supra*, and notes; 2 R. C. L., p. 332, § 12. This view renders it unnecessary to consider the effect of the application made by defendants to set aside the judgment in the Justice's Court. We note, however, that no record appears of any answer to the complaint being tendered by them in that action.

There were informalities in the Justice's Court which the petition refers to and which we have examined. We find no fatal defect nor any error in the procedure affecting the substantial rights of those defendants. It is alleged in the petition that the complaint unites several causes of action. Such an irregularity should have been taken advantage of by a demurrer and is cured by judgment: Sections 68 and 72, L. O. L.; 31 Cyc. 776, et seq.; *Davidson* v. *Oregon & Cal. R. R. Co.*, 11 Or. 136 (1 Pac 705). From the return to the writ of review we find no substantial error. It follows that the judgment of the lower court must be reversed and the writ dismissed and it is so ordered. REVERSED. WRIT DISMISSED.

Argued on demurrer May 15, overruled May 15, opinion filed June 6, 1917.

Argued on the merits May 17, writ issued May 22, opinion filed June 6, 1917.

STATE ex REL. *v.* STANNARD.

(165 Pac. 566; 165 Pac. 571.)

ON DEMURRER.

Mandamus—Capacity of Governor to Sue—Constitution.

1. Under Article V, Section 10, of the Constitution, declaring that the Governor shall take care that the laws shall be faithfully executed, the Governor of the state has the right to bring *mandamus* to compel the county clerk of a county, the sheriff, the county judge, and others to perform the duties imposed upon them by law in regard to the calling and holding of elections, and, in particular, in respect to a special election.

Mandamus—Prematurity of Proceeding—Compelling Action by Election Officials.

2. The Governor could bring *mandamus* to compel the county clerk of a county, the sheriff, and other officers to perform the duties imposed upon them by law in regard to the calling and holding of election before the time had arrived on which the posting of notices and other prerequisites to the election are required to be done, the officials having absolutely refused to take steps toward holding the election, and declared their intention not to do so, since, though ordinarily *mandamus* will not lie to compel the performance of an act until the time for doing the act has arrived, where a refusal to perform has occurred, and where it seems probable that the act will not be performed within the time required, *mandamus* will lie, and a proceeding brought upon the strength of the refusal is not premature.

ON THE MERITS.

Counties—Limitation of Expenditures—Removal of Restrictions—Special Elections.

3. Under Laws of 1917, page 894, directing that a special election be held in June, in all voting precincts of the state, for the purpose of voting on proposed laws and constitutional amendments, authorities of Curry County were not justified in refusing to take steps toward holding the election on the ground the county budget made no provision for the election, for the reason that the next regular election will occur in 1918, although Laws 1913, page 458, provides that no greater expenditure of public moneys shall be made for any specific purpose than the amount estimated in the budget plus 10 per cent, the act of 1917 removing the restrictions by an implied command that the several counties pay the expense of such election.

Constitutional Law—Public Policy—Adoption by Voters.

4. Questions of public policy and questions of what it is best to insert in the Constitution must be regarded as having been conclusively settled when the legal voters adopted the amendment.

Constitutional Law—Judicial Functions—Construction.

5. The oath of the judiciary is to construe the Constitution as it is and not as it might have been.

Counties—Exceeding Debt Limit—"Involuntary Indebtedness"—Elections.

6. Under Article XI, Section 11, of the Constitution, (see Laws 1917, p. 12), providing that the prohibition against the creation of debts by counties prescribed by Section 10 of this Constitution shall apply and extend to debts hereafter created in the performance of any duties or obligations imposed upon counties by the Constitution or laws of the state, etc., any debt contracted by Curry County in holding the special election provided for by Laws 1917, page 894, would be an "involuntary indebtedness," incurred in the performance of a duty and obligation imposed by a law of the state, and therefore prohibited, if exceeding the $5,000 limit fixed by said Section 10.

Counties—Debt Limit—Presumptions.

7. After a levy is made, the payment of taxes is regarded as a certainty, and, for the purpose of determining whether an expenditure will exceed the debt limits of a county, it will be assumed that the tax has been collected.

Counties—Elections—Expenditure of Funds—Preferences.

8. Although, if its plans were carried out, it would be impossible for county to hold the special election provided for by Laws 1917, page 894, without exceeding the constitutional debt limit, it must set aside a sufficient sum to pay for the election, and out of the balance pay for its plans, such obligation having preference.

[As to *mandamus* in matters relating to elections, see note in 98 **Am. St. Rep.** 886.]

Original proceeding in Supreme Court in *mandamus*.

Proceeding in *mandamus* by the State of Oregon, upon the relation of James Withycombe, Governor, against J. R. Stannard, county clerk of Curry County, Oregon; William Tollman, sheriff of Curry County, Oregon; W. A. Wood, county judge of Curry County, Oregon, and G. J. Heiberger and E. B. Sypher, county commissioners, the three last-named parties constituting the County Court of Curry County, Oregon, to require said defendants to perform their official duties in regard to calling and holding the special election in Curry County on June 4, 1917. To the writ, defendants file a demurrer. Demurrer overruled.

Mr. Samuel M. Endicott, for the demurrer.

Mr. George M. Brown, Attorney General, and *Mr. Isaac H. Van Winkle,* Assistant Attorney General, *contra.*

In Banc. Opinion by MR. CHIEF JUSTICE MCBRIDE.

This is a proceeding in *mandamus* to compel the defendants to perform the duties imposed upon them by law in regard to the calling and holding of elections, and in particular in respect to the special election to be held throughout the State of Oregon on June 4, 1917. It is alleged that the defendants, who are the county commissioners, county judge, clerk, and the sheriff of Curry County, refuse to take steps required by law or to give the notices necessary in respect to such special election, and declare that they will not take the steps required by law to hold such election.

To this writ a demurrer is filed stating two grounds: (1) That the relator has not the legal capacity to sue; and (2) that the writ does not state facts sufficient to constitute a cause of action. As to the first ground it may be said, in brief, that by Article V, Section 10, of the Constitution it is declared that the Governor shall take care that the laws shall be faithfully executed.

1. Where a public official charged with a duty to the whole state, as in this case, refuses to execute the law and to perform his duty in that regard we think the Governor is acting only in obedience to this requirement of the Constitution in appealing to the court to compel that official to perform such legal duty.

2. It is also alleged that this proceeding is premature, and that *mandamus* will not lie until the time has arrived upon which the posting of notices and other prerequisites to an election are required to be done. Upon this theory the relator would be compelled to wait until

the last minute of the last hour within which the act might be done, and after that time had expired before he could bring a proceeding to compel the act to be performed. A proceeding to compel performance of an act after the time for such performance has expired would be futile and would result in a condition wherein there would be no adequate remedy against a grave public wrong. The law does not contemplate any such absurdity; and accordingly it has been held that while ordinarily *mandamus* will not lie to compel the performance of an act until the time for doing the act has arrived, yet where a refusal to perform the act has occurred and where it seems probable that the act will not be performed within the time required *mandamus* will lie, and a proceeding brought upon the strength of such refusal is not premature: *State ex rel.* v. *Chicago etc. R. Co.*, 85 Kan. 649 (118 Pac. 872); *Attorney General* v. *City of Boston*, 123 Mass. 460; *People ex rel.* v. *Smith*, 152 App. Div. 514 (137 N. Y. Supp. 387). The latter case was one of *mandamus* to compel the board of elections to file certain certificates of nomination, wherein the court says:

"The duty devolved upon the board of elections is to file certificates of nomination which are in conformity to the provisions of the last valid statute relating thereto, if any such exists. No express demand to file any particular certificate has been made upon defendants. There has been no express refusal to do so. Granting that defendants' duty is a public one, and that omission to perform such duty is equivalent to a refusal to perform * * it may be urged that as yet the defendants have not omitted to perform, for the time fixed within which performance may be had has not yet expired. * * But although evidence is lacking of an express refusal to perform a particular act, we think that it may justly be inferred that defendants will refuse to file any certificate except one which shall

comply with the requirements of the statute above referred to. * * Where delay in reaching such determination will result in depriving one of an efficient remedy if the determination is erroneous, either the presumption above referred to should prevail, or the person charged with the performance of the duty should seasonably announce his determination respecting his future action in terms admitting of no mistake or misunderstanding."

The case above cited is not so strong as the case at bar because here the defendants absolutely refused to take steps toward holding the election and declared their intention not to do so. The statutes under which these decisions were rendered are similar to our own and the opinions seem to be based upon sound common sense.

The following cases are cited as holding a contrary view, and while some of them upon a cursory examination would appear to be in point yet when thoroughly analyzed none of them are applied to circumstances exactly identical to those in the case at bar.

The first case is *County Commissioners of Lake County* v. *State,* 24 Fla. 263 (4 South. 795). In this case there was no allegation in the complaint that the commissioners had refused to call the election. It was only alleged that they did not intend to and would not perform that duty. The court held that this was not a sufficient allegation to call into effect the power of *mandamus.* The other Florida cases are to the same effect.

Lee v. *Taylor,* 107 Ga. 362 (33 S. E. 408), merely holds that *mandamus* will not lie to compel a tax collector to pay over tax moneys to an outgoing treasurer so that such treasurer can get a commission. It seems to have no relation whatever to the case at bar.

In *Gormley* v. *Day*, 114 Ill. 185 (28 N. E. 693), there does not appear to have been any refusal on the part of the clerk to post the copies of an ordinance. The court also held on the merits that the petitioner was not entitled to the relief sought. The case is not in point.

The case of *People* v. *Quinn*, 143 Ill. App. 123, was a *mandamus* proceeding by the city treasurer to compel the city comptroller to pay over to the relator moneys received by such comptroller from day to day as they were collected. It was held that *mandamus* does not lie to direct the performance of an act until a default, that the defendant was entitled to a reasonable time within which to pay over the money he held, and that if he held it beyond such time *mandamus* would lie. In that case it is apparent that no serious mischief would have resulted had the issuance of a writ been delayed until after refusal to comply, while in the case at bar it is plain that delay in the issuance of the writ until the time prescribed by law for the County Court of Curry County to perform its duty would render any proceeding entirely futile and might result in defeating the will of the people of the whole state as to important measures to be submitted at the ensuing special election.

The case of *State ex rel. Cook* v. *Houser*, 122 Wis. 534 (100 N. W. 964), grew out of a political controversy as to whether the LaFollette or anti-LaFollette delegates should be placed on the ballot as the genuine Republican delegates. The court held that as the time for placing the names of the candidates upon the official ballot had not arrived the proceeding was premature. Nevertheless they went into the question upon its merits in an opinion which owing to its learned length it is impossible to epitomize here. In

said case, as in a case in Wisconsin hereafter to be noted, we find the court practically conceding that there may be "special circumstances" in which courts will depart from the general rule that *mandamus* will not lie to compel the performance of an act until the duty to perform it is due.

Ex parte Cutting, 94 U. S. 14 (24 L. Ed. 49), was *mandamus* to compel the court to allow an appeal. *Held*, that the petition must show that the petitioner has a clear right to an appeal which has been refused him, and that it was not shown in that particular case. The case is not in point.

State ex rel. v. *Hunter*, 111 Wis. 582 (87 N. W. 485), was a *mandamus* proceeding to compel a city treasurer to set aside certain moneys as school funds, wherein it was held that the funds had not yet come into his hands and might never come there, and that the application was premature. In the course of the opinion it is said that *mandamus* will not lie to compel the performance of an act not yet due by a public officer because of a mere threat by him that he will not perform it.

The court admits that this is contrary to the ruling in *Attorney General* v. *City of Boston*, 123 Mass. 460, and adds very significantly:

"Extreme cases may, perhaps, arise demanding the use of *mandamus* to control the performance of prospective duties, but this is certainly not such a case."

It appears to us that the case at bar is just such an "extreme case." Here there rests upon the County Court of Curry County an important duty, which by their general demurrer they admit they have been requested to perform and refuse to perform and will not perform; and this, too, in a case where such refusal might defeat the will of the whole people of the state

in respect to important measures which will come up for their vote at the ensuing election. They say, in effect, that they intend to paralyze the arm of the state and defeat the will of the voters. If this is not an extreme case, it would be difficult to find such.

The case of *Northwestern Warehouse Co.* v. *Oregon R. & N. Co.*, 32 Wash. 218 (73 Pac. 388), was *mandamus* to compel defendants to build a sidetrack for plaintiff's warehouse. This is a somewhat complicated case, in which it is announced that *mandamus* will not lie in anticipation of a supposed omission of duty, but it must appear that there has been an actual default in the performance of a clear legal duty actually due. The court held that the law did not require the defendants to construct the track, and the case went off on entirely different grounds from anything involved in the case at bar.

Sights v. *Yarnalls*, 12 Gratt. (Va.) 292, was *mandamus* to compel the issuance of a saloon license, in which it was held that *mandamus* would not lie to compel the council to grant a license until the time had arrived at which the application for such license could come up for consideration. This was evidently a case where a delay would not defeat plaintiff's right.

Spiritual Atheneum Soc. v. *Selectmen, etc.*, 58 Vt. 192 (2 Atl. 747), is a case fully covered by the syllabus, which is as follows:

"A petition for a writ of *mandamus* will not be granted to compel public officers to do an act already beyond their control, nor against their successors in office not yet elected to compel them to perform an act in the future."

It is evident this case is not in point by a thousand miles.

Thaxton v. *Terrell,* 99 Tex. 562 (91 S. W. 559). This was *mandamus* to compel the land commissioner to receive an application for state land. It appears that defendant accepted the application after the writ issued subject to certain conditions as to the minerals on the same. It was held that this acceptance avoided the necessity of issuing the writ; that plaintiff had a remedy in equity to compel the issuance of patents without the restrictions imposed by the land commissioner. For that reason the case is not in point.

State ex rel. v. *Bates,* 38 S. C. 326 (17 S. E. 28), was *mandamus* to compel the state treasurer to transfer certain stocks formerly owned by a deceased person to the relator, who was his legatee, and the court in that case decided that such transfer should not be made until the expiration of one year prescribed by law for creditors to present their claims, and that for this reason the application was premature. It is plain that the transfer might never be made if the claims should consume the stock. The case is not in point.

City of Zanesville v. *Richards,* 5 Ohio St. 589, was *mandamus* to require the auditor to enter upon the tax list for the years 1855 and 1856 certain taxes levied for city purposes for these years. The return showed that the time had passed within which the auditor could place levies upon the tax list for 1855, said list having passed out of his hands, and that the list for 1856 had not yet come into his possession. The case does not disclose that he refused to place the taxes for 1856 on the list when they should come into his possession. The case is easily distinguishable from the one at bar for the reasons already given.

State ex rel. v. *School District,* 8 Neb. 93, is a similar case, in which there is no allegation of a demand or refusal to comply.

In *State* v. *Associated Press,* 159 Mo. 410 (60 S. W. 91, 81 Am. St. Rep. 368, 51 L. R. A. 151), demand and refusal had not occurred. The court lay special stress upon this fact.

Board of Commissioners, etc. v. *Allegany County Commissioners, etc.,* 20 Md. 449, was *mandamus* to compel the county commissioners to levy a tax, and it was therein held that there was no presumption that because the commissioners had refused to levy the same kind of a tax in 1861 they would refuse to levy it in 1862, and that the court would not act on such presumption.

Sterling v. *McMaster,* 82 Md. 164 (33 Atl. 461). This was *mandamus* to compel McMaster, treasurer and collector, to place in the hands of the sheriff bills for the collection of unpaid taxes. The case is somewhat similar in some respects to the case at bar, but it has this distinguishing feature: In that case there was ample time left after the period fixed by law for the treasurer to turn over the bills in which *mandamus* might be brought and the alleged duty enforced. A failure to issue the writ therefor would not work any serious injury, and under these circumstances the court held that the writ was premature. These are practically all the cases cited outside of our own state, and in many of them it is laid down as a general rule that *mandamus* will not issue to compel the performance of a duty before the time for such performance has arrived. This rule in some form or other has been "parrotted" down from court to court and from judge to judge without any particular reason being given for it or any attempt to distin-

guish between those cases where a denial of the writ will work no serious or irreparable injury and those "extreme cases," to use the words of the Michigan supreme court, where such denial would work great injustice or public injury or prevent the exercise of the constitutional right of all citizens of the state to a voice in the elections. The rule as a general one is good, but as heretofore shown there are well-defined exceptions to it, and this is one of them. The courts will not chop technicalities when their aid is asked to compel the performance by a public officer of a duty which he owes to the citizenry of the whole state, but where no other remedy presents itself will exercise their constitutional authority to compel by *mandamus* the performance of such duty.

The demurrer is overruled.

MR. JUSTICE MCCAMANT took no part in the consideration of this case.

MR. JUSTICE BURNETT delivered the following dissenting opinion:

On petition of the relator an alternative writ of *mandamus* issued out of this court reciting the official character of the Governor of the state and of the attorney general and the fact that the defendants are officers of Curry County. It is also set forth that by chapter 422 of the Laws of 1917, now in effect, a special election is required to be held throughout the state June 4, 1917, at which sundry legislative enactments and proposed amendments to the Constitution shall be submitted to the people for their approval or rejection. The essential charging part of the writ reads thus:

"That notwithstanding the provisions of said chapter 422, Laws of 1917, and the requirements of the

other laws of the state of Oregon, the defendants herein and each of them have refused and do now refuse to perform the duties imposed upon them by law with respect to giving notice of and holding elections with reference to the election provided for in said chapter 422, within Curry County, or to do or perform any other duty or thing with respect to preparing for, giving notice of, or holding any election within said Curry County, Oregon, on the fourth day of June, 1917, or to canvass or abstract and record the returns of said or any election to be held on said date, or to transmit the certificate thereof to the secretary of state, or to do any other act or thing in connection therewith, and threaten and declare that they will not do so, and, unless commanded so to do by order of this honorable court will not perform such duties aforesaid. * * "

A demurrer to the writ having been overruled *pro forma,* the defendants have answered to the effect that Curry County has no funds available for the expense of the election it not having been included in the annual budget; further, that the county is already indebted in at least the sum of $5,000 and that the additional expenditure involved will be in excess of the constitutional limit; and lastly, that in order to meet the cost of the election the County Court will be compelled to levy taxes in excess of the 6% limit prescribed by the constitutional amendment adopted at the November election held in 1916.

The initial act required in the matters involved is for the county clerk to issue notice of election not less than ten days prior to the day appointed for holding the same. This action is not indispensably necessary of performance in any event until at least May 24, 1917, a date yet in the future. The quoted excerpt from the writ, upon which the relator bases his claim, contains only conclusions of law. It is in effect noth-

ing more than the expression of his prediction that the defendants will not meet his views of the law in their action in the premises. Mr. Chief Justice MOORE, writing in *State ex rel.* v. *Williams,* 45 Or. 314, 330 (77 Pac. 965, 67 L. R. A. 166), said:

"The writs having stated that the municipal judge neglected to issue bench warrants 'as required by law,' the phrase quoted is only a legal conclusion, and not the averment of a material fact, stated as the foundation of an enforceable right."

This doctrine is well supported by many authorities both before and since then holding that such statements do not present any issue for consideration.

Moreover, paraphrasing the statement of the writ, the defendants have a right to "refuse and to now refuse to perform the duties imposed upon them by law" for the very good reason that the time for their performance has not yet arrived.

"A relator is not entitled to the writ unless he can show a legal duty then due at the hands of the respondent; and until the time arrives when the duty should be performed, no threats or predetermination not to perform it can take the place of such default. The law does not contemplate such a degree of diligence as the performance of a duty not yet due. The general rule is that the writ will not be granted in anticipation of a supposed omission of duty, however strong the presumption may be that the person sought to be coerced by the writ will refuse performance at the proper time. An important reason for refusing the writ in such cases is, that until the duty is due, no practical question can be presented to the court, but simply a supposed case." 2 Spelling, Extraordinary Relief, § 1385. Again, we find in section 12 of High on Extraordinary Legal Remedies (3 ed.), the following:

"*Mandamus* is never granted in anticipation of a supposed omission of duty, however strong the pre-

sumption may be that the persons whom it is sought to coerce by the writ will refuse to perform their duty when the proper time arrives. It is therefore incumbent upon the relator to show an actual omission on the part of the respondent to perform the required act; and since there can be no such omission before the time has arrived for the performance of the duty, the writ will not issue before that time. In other words, the relator must show that the respondent is actually in default in the performance of a legal duty then due at his hands, and no threats or predetermination can take the place of such default before the time arrives when the duty should be performed; nor does the law contemplate such a degree of diligence as the performance of a duty not yet due."

This court itself has spoken on the same subject in *State* v. *Bryan,* 26 Or. 502, 507 (38 Pac. 618), where Mr. Justice WOLVERTON writing, uses this language:

"It is a just presumption that all public officers will faithfully discharge the functions of their respective offices, and observe all the duties enjoined upon them by law, and it would be a work of supererogation for the courts by *mandamus* or other process to command them to perform their duties *in futuro* as they are by law directed. Courts will not assume or exercise supervisory control over public officers and functionaries, whether state, county, or municipal, nor will they attempt to control their acts, or command them to act, except in cases where there has been a plain violation of official and public duty which the law specially enjoins upon them, and it is made to appear that some private individual or the public has a legal right or title to the due performance of such duty, and that there exists no other plain, speedy, or adequate remedy in the ordinary course of law."

The following precedents are to the same effect: *U. S.* v. *Bowen,* 6 D. C. 196; *County Commrs. of Lake Co.* v. *State,* 24 Fla. 263 (4 South. 795); *Ex parte Ivey,* 26 Fla. 537 (8 South. 427); *Lee* v. *Taylor,* 107

Ga. 362 (33 S. E. 408); *Gormley* v. *Day,* 114 Ill. 185 (28 N. E. 693); *Chicago etc. R. R. Co.* v. *Olmstead,* 46 Iowa, 316; *State* v. *Carney,* 3 Kan. 88; *Sterling* v. *McMaster,* 82 Md. 164 (33 Atl. 461); *Board of Commrs. etc.* v. *Alleghaney Co. Commrs.,* 20 Md. 449; *State* v. *Associated Press,* 159 Mo. 410 (60 S. W. 91, 81 Am. St. Rep. 368, 51 L. R. A. 151); *State* v. *School Dist.,* 8 Neb. 92; *Hardin* v. *Guthrie,* 26 Nev. 246 (66 Pac. 744); *State* v. *Noyes,* 25 Nev. 31 (56 Pac. 946); *Zanesville* v. *Richards,* 5 Ohio St. 589; *State* v. *Bates,* 38 S. C. 326 (17 S. E. 28); *Thaxton* v. *Terrell,* 99 Tex. 562 (91 S. W. 559); *Spiritual Atheneum Soc.* v. *Selectmen, etc.,* 58 Vt. 192 (2 Atl. 747); *Sights* v. *Yarnalls,* 12 Gratt. (Va.) 292; *Northwestern Warehouse Co.* v. *Oregon R. & N. Co.,* 32 Wash. 218 (73 Pac. 388); *State* v. *Hunter,* 111 Wis. 582 (87 N. W. 485); *Ex parte Cutting,* 94 U. S. 14 (24 L. Ed. 49); *State* v. *Houser,* 122 Wis. 534 (100 N. W. 964); *People* v. *Quinn,* 143 Ill. App. 123; *Missouri etc. R. Co.* v. *Thompson,* 55 Tex. Civ. 12 (118 S. W. 618); *State* v. *Adcock,* 225 Mo. 335 (124 S. W. 1100); *Pierce* v. *Executive Council,* 165 Iowa, 465 (146 N. W. 85); *Scott* v. *Singleton,* 171 Ky. 117, (188 S. W. 302).

A leading case sometimes cited in opposition to this doctrine is that of *Attorney General* v. *City of Boston,* 123 Mass. 460, where the city council, authorized by statute to maintain a ferry at rates to be prescribed, ordered that it be free of ferriage after a certain future day, and the court, on application made before that time arrived, compelled the continued collection of toll by a writ of *mandamus.* Rightly considered this case is not variant in principle from those already cited, for the duty to collect toll was imperative at and before the issuance of the writ and it was what the court sought to enforce by its precept.

Besides the statute of the state of Massachusetts governing the matter gives jurisdiction to its courts far more extensive than ours on the subject of *mandamus*. The law of that state, as quoted in the opinion is this:

"The court shall have general superintendence of all courts of inferior jurisdiction to correct and prevent errors and abuses therein, where no other remedy is expressly provided, and may issue writs of error, *certiorari*, *mandamus*, prohibition, *quo warranto*, and all other writs and processes to courts of inferior jurisdiction, corporations and individuals, necessary to the furtherance of justice and the regular execution of the laws": Gen. Stats., c. 112, § 3.

The procedure there contemplates that *mandamus* may be used as a preventive remedy. This case has been cited many times as authority for allowing *mandamus* at the suit of some private person or of the attorney general to enforce a general public duty, but rarely, if ever, in support of the proposition that the writ will lie to enforce a duty not due when it was issued. In *State ex rel.* v. *Chicago B. & Q. R. R. Co.*, 85 Kan. 649 (118 Pac. 872), this procedure was employed to compel two railroads to install connections as required by an order of the railroad commission directing the work to be done within ninety days. The precept was issued three days after the order was made. The defendants defended on the merits pointing out, among other things, that it would be an unreasonable burden, entailing more expense than the revenue derived therefrom would liquidate. By some means or other the decision was delayed until after the expiration of the ninety days. Under those circumstances the court made the rule absolute, but

the same judge who penned the majority opinion dissented from the doctrine thereof on this point, saying:

"The duty and the time were coextensive. It was held in *State* v. *Carney,* 3 Kan. 88, that 'no previous threat or predetermination not to perform a legal duty can amount to a fault or omission, even though the showing be sufficient to convince the court that the respondents will omit to perform their duty.' This was followed in *State ex rel. Reynolds* v. *Barker,* 4 Kan. 435, in *Dobbs* v. *Stauffer,* 24 Kan. 127, and quoted with approval in *Rosenthal* v. *State Board of Canvassers,* 50 Kan. 129 (32 Pac. 129, 19 L. R. A. 157), and is in accord with the mandatory requirement of the statute. A present omission to do a future duty is a legal impossibility. The first time when it could be definitely known that the order had been disobeyed was nearly ninety days in the future, and I think an action before that time must have been premature."

In *Nevada Tax Commission* v. *Campbell,* 36 Nev. 319 (135 Pac. 609), the court gave a moot opinion on the duty of county officers to furnish tax rolls by a certain future time, but dismissed the proceeding with leave to apply again if the plaintiff should be so advised. It was said explicitly, though, that the writ would not be granted in anticipation of a refusal to perform the duty when the time for it should come. *State* v. *Metcalf,* 18 S. D. 393 (100 N. W. 923, 67 L. R. A. 331), was a case where the defendant officer was required by alternative *mandamus* to place the names of certain candidates on the official ballot. Without citing authority in support of its opinion the court said:

"Having made his demand, concerning which no doubt exists in this case, if the auditor did not express a willingness to comply therewith, it was proper to institute this proceeding, when, if defendant intended to comply with the demand, he might have disclosed such intention and have avoided any judgment for disbursements. But, having answered and contested the rela-

tor's right, he cannot be heard to say that he would or might have complied with the relator's demand."

A similar case, *People* v. *Smith,* 152 App. Div. 514 (137 N. Y. Supp. 387), cited in support of the instant writ, was modified on appeal in 206 N. Y. 231, 241 (99 N. E. 568), the court saying that it should not be considered as a precedent and that it should be limited to the very case itself. Later, in *People* v. *Britt,* 206 N. Y. 246, 249 (99 N. E. 573), the case was further limited, and speaking of the situation the court says: "The remedy for this incongruous result is with the legislature." These few cases are opposed to the great weight of authority and are sporadic instances of where courts have used their power in meddling with mere political questions.

It is required by our statute that the writ shall "state concisely the facts, according to the petition, showing the obligation of the defendant to perform the act, and his omission to perform it": Section 616, L. O. L. There can be no present omission to perform an act in the future. The writ is not to be confounded with injunction. Neither can it be made to perform the office of a bill of *quia timet.* We are not required to balance the relator's fears for the future against the presumption that the defendant officers will regularly perform their duties at the proper time. *Mandamus* ought to be used sparingly and only in clear cases, and this court ought not hastily to use its original jurisdiction to clarify a mere political emergency. No refusal to perform any official act, presently required, or past due, is imputed to any of the defendants, and if we regard the authority of *State ex rel. Booth* v. *Bryan,* already decided by this court, as well as the great weight of reason and precedent, the writ should be dismissed.

Peremptory writ issued May 17, 1917.

ON THE MERITS.

(165 Pac. 571.)

In Banc. Statement by MR. JUSTICE HARRIS.

The twenty-ninth legislative assembly passed two proposed laws and at the same time, under the authority of Article IV, Section 1 of the state Constitution, referred them to the people for approval or rejection. The legislature also proposed five amendments to the state Constitution, and, pursuant to Article XVII, Section 1 of the organic act, these proposed amendments were ordered submitted to the people for their approval or disapproval. Chapter 422, Laws 1917, directs that a special election be held on June 4, 1917, in all the voting precincts of the state, and that the two proposed laws and the five proposed amendments shall be submitted to the legal voters for their approval or rejection at such special election.

The constituted authorities of Curry County announced that they would not obey the mandate of the legislature, and that they would not take any steps towards holding an election in Curry County. Upon the petition of James Withycombe, as Governor of Oregon, an alternative writ of *mandamus* was issued out of this court commanding the clerk, sheriff, county judge and commissioners of Curry County to perform all the duties imposed upon them by the laws regulating elections, or to show cause for any failure on their part.

The defendants demurred to the alternative writ, but the demurrer was overruled for reasons expressed in an opinion by Mr. Chief Justice MCBRIDE. The county officials then answered by admitting that they

"have refused and do now refuse to do the things or perform the acts specified and set forth in the general election laws of Oregon to be done and performed by the respective county officers with respect to giving notice of and holding elections with reference to the election provided in said Chapter 422, within Curry County, or to do or perform any other act or thing with respect to preparing for, giving notice of, or holding any election within said Curry County, Oregon, on the 4th day of June, 1917."

The answer contains three further and separate defenses; and for the purpose of supporting these separate defenses the defendants relate the facts concerning the budget and the tax levy for 1917, the present indebtedness, and the probable expense of holding an election. The petitioner demurred to the answer. After hearing the arguments of counsel, we rendered an oral decision sustaining the demurrer and directing the issuance of a peremptory writ of *mandamus* ordering the defendants to hold the election; and this written opinion is prepared for the purpose of complying with a requirement of the Constitution. The parties have supplemented the writ and answer by a written stipulation giving detailed information concerning the items in the budget, the levy for 1917, and the character of the outstanding indebtedness. The answer expressly admits all the facts averred in the writ; the demurrer to the answer admits the facts alleged in that pleading; by the written stipulation, the parties added to the facts related in the writ and answer; and therefore the controversy was presented upon an undisputed statement of facts.

In November, 1916, an itemized estimate of the expenses proposed to be incurred during the year 1917 was made in full compliance with Chapter 234, Laws 1913, commonly known as the budget law. The budget

contains estimates for the salaries to be paid to the several county officers. The estimated cost of the County Court is $1,300, of the Circuit Court $1,500, of the Justice Court $700, of books, stationery, postage, telephone, express and freight for all offices $1,500, of water, fuel, lights, repairs and furniture for all offices and of new vaults for treasurer's office $800, of board of prisoners $400, of medical attendance, clothing and board for the poor, $700, of auditing county books $175, of bounties on wild animals $1,000, of widows' pensions $400, of advertising and printing $700, of interest on warrant indebtedness $4,000, and of insane $100. The budget also includes estimates for bridges, roads and schools. However, no provision was made for election expenses for the reason that the next regular election does not occur until 1918. According to the written stipulation a tax levy was made on December 29, 1916, as follows: "For state tax 2.3 mills; county tax, general 4.1 mills; school purpose 1.6 mills; road and bridges 7 mills." The county owes $5,000 for debts contracted pursuant to state laws and incurred prior to November 7, 1916, when Section 11 was added to Article XI of the Constitution. The tax levy for 1917 was made in accordance with the budget for that year, and, exclusive of state taxes, the levy will produce $61,120. It will cost $1,200 to hold an election in Curry County. If during 1917 the county expends the full amounts estimated for the several items mentioned in the budget and if the county also incurs a debt of $1,200 for holding an election, the total indebtedness will exceed $5,000; but this conclusion rests on the assumption that the county has no income except from the tax levy made in December, 1916.

PEREMPTORY WRIT ISSUED.

For petitioner, Mr. James Withycombe, Governor, there was a brief with oral arguments by *Mr. George M. Brown,* Attorney General, and *Mr. Isaac H. Van Winkle.*

For defendants there was a brief with oral arguments by *Mr. Samuel M. Endicott* and *Mr. Walter C. Winslow.*

MR. JUSTICE HARRIS delivered the opinion of the court.

The officials of Curry County offer three excuses for their refusal to prepare for holding the special election. The first excuse arises out of the fact that the budget for 1917 makes no provision for an election; the second proceeds upon the theory that the expense of the election will increase the indebtedness of the county beyond the maximum limit fixed by Article XI, Section 11 of the Constitution; and the third is predicated upon the contention that the tax levy for 1918 will necessarily be raised over and above the increase permitted by Article XI, Section 11 of the organic act. In brief, the defendants argue that there is no election fund available to pay the cost of the election; that the expense of the election will increase the indebtedness beyond the limit fixed by the Constitution; and that to raise the money to pay the expense of the election will require a levy for 1918 in excess of the limit allowed by the Constitution. Since the defenses interposed by the defendants grow out of the budget law and Sections 10 and 11 of Article XI of the Constitution, it will be appropriate first to call attention to the statute and the Constitution.

The budget law requires the County Court to make an estimate of the amount of money proposed to be

raised by taxation for the ensuing year. The statute directs that the estimate shall be fully itemized, showing under separate heads the amount required for each department of county government, county office, each county improvement, building, roads, bridges and

"shall contain a full and complete disclosure of the contemplated expenditures from the money or moneys proposed to be raised by taxation, showing the amount of each public expense."

The estimates and the tax proposed to be levied must be published together with a notice of the time and place at which the taxpayers can discuss the budget and proposed tax with the County Court. After the hearing is had, the County Court is directed to declare the amount of taxes to be raised and to make a levy sufficient to raise the necessary taxes,

"and no greater tax than that so entered upon the record shall be levied by the authority proposing such tax for the purpose indicated or collected, and thereafter no greater expenditure of public moneys shall be made for any specific purpose than the amount so estimated and 10 per cent thereof": Chapter 234, Laws 1913.

Article XI, Section 10 of the Constitution originally read thus:

"No county shall create any debts or liabilities which shall singly or in the aggregate exceed the sum of five thousand dollars, except to suppress insurrection or repel invasion; but the debts of any county at the time this Constitution takes effect shall be disregarded in estimating the sum to which such county is limited."

At the regular general election held on November 8, 1910, this section of the Constitution was amended to read as follows:

"No county shall create any debts or liabilities which shall singly or in the aggregate exceed the sum of five thousand dollars, except to suppress insurrection or repel invasion, or to build permanent roads within the county, but debts for permanent roads shall be incurred only on approval of a majority of those voting on the question": Laws 1911, p. 11.

At the next regular general biennial election held on November 5, 1912, the section was again amended and it now appears thus:

"No county shall create any debts or liabilities which shall singly or in the aggregate with previous debts or liabilities exceed the sum of five thousand dollars, except to suppress insurrection or repel invasion or to build and maintain permanent roads within the county; and debts for permanent roads shall be incurred only on approval of a majority of those voting on the question, and shall not either singly or in the aggregate with previous debts and liabilities incurred for that purpose exceed two per cent of the assessed valuation of all the property in the county": Laws 1913, p. 9.

A new section, designated as Section 11 of Article XI, was added to the Constitution at the election held on November 7, 1916, and it is here set out in full:

"Unless specifically authorized by a majority of the legal voters voting upon the question neither the state nor any county, municipality, district or body to which the power to levy a tax shall have been delegated shall in any year so exercise that power as to raise a greater amount of revenue for purposes other than the payment of bonded indebtedness or interest thereon than the total amount levied by it in the year immediately preceding for purposes other than the payment of bonded indebtedness or interest thereon plus six per centum thereof; provided, whenever any new county, municipality or other taxing district shall be created and shall include in whole or in part property theretofore included in another county, like municipality or

other taxing district, no greater amount of taxes shall be levied in the first year by either the old or the new county, municipality or other taxing district upon any property included therein than the amount levied thereon in the preceding year by the county, municipality or district in which it was then included plus six per centum thereof; provided further, that the amount of any increase in levy specifically authorized by the legal voters of the state, or of a county, municipality, or other district, shall be excluded in determining the amount of taxes which may be levied in any subsequent year.

"The prohibition against the creation of debts by counties prescribed in Section 10 of Article XI of this Constitution shall apply and extend to debts hereafter created in the performance of any duties or obligations imposed upon counties by the Constitution or laws of the state, and any indebtedness created by any county in violation of such prohibition and any warrants for or other evidences of any such indebtedness and any part of any levy of taxes made by the state or any county, municipality or other taxing district or body which shall exceed the limitations fixed hereby shall be void": Laws 1917, p. 12.

3. Recurring to the answer, the first defense is rested upon the provisions of the budget law. The argument is that Chapter 234, Laws 1913, commands that no greater expenditure of public moneys shall be made for any specific purpose than the amount estimated in the budget plus 10 per cent; that the budget made no provision for elections for the reason that the next regular election will occur in 1918; and that therefore to spend public moneys in 1917 for a special election would be to violate Chapter 234, Laws 1913. The budget law was enacted by the legislature and the same body passed Chapter 422, Laws 1917, providing for the special election. The authority that restricted the disbursements to specified purposes, can, subject

to certain exceptions not controlling here, afterwards remove those restrictions. The act of 1917 directing that a special election be held also carries with it an implied command that the several counties of the state pay the expenses of such election; and therefore the restrictions imposed by the earlier statute of 1913 are removed to whatever extent it may be necessary to release the county from that statute in order to permit compliance with the later statute of 1917.

The second and third defenses may be considered together since they depend upon tax and indebtedness limitations prescribed by the Constitution. Section 11 of Article XI is divided into two paragraphs. The first paragraph imposes a limitation upon the power to tax, while the second prescribes a limitation upon indebtedness. Notwithstanding the language employed in Section 11, it was earnestly argued that this section will not include indebtedness incurred in holding the special election, for the reason that such indebtedness would be involuntarily incurred in the performance of an obligation thrust upon it by the legislature. All doubts concerning the intent and the meaning of Section 11 will be removed if we first call attention to the construction that for more than a quarter of a century was placed upon Section 10, and if we then carry that construction with us and apply it as directed by Section 11. In *Grant County* v. *Lake County*, 17 Or. 453, 464 (21 Pac. 447), this court held that Section 10 only applied to debts and liabilities, which a county voluntarily created, and that it did not include involuntary indebtedness thrust upon it by operation of law. The first judicial construction placed upon Section 10 has been adhered to in every subsequent adjudication, whether the section was presented in its original or in its amended form; and no difference of opinion can

possibly exist concerning the accepted meaning of this provision of the Constitution: *Wormington* v. *Pierce*, 22 Or. 606, 614 (30 Pac. 450); *Burnett* v. *Markley*, 23 Or. 436, 440 (31 Pac. 1050); *Dorothy* v. *Pierce*, 27 Or. 373, 375 (41 Pac. 668); *Municipal Security Co.* v. *Baker County*, 33 Or. 338, 343 (54 Pac. 174); *Eaton* v. *Mimnaugh*, 43 Or. 465, 471 (73 Pac. 754); *Brockway* v. *Roseburg*, 46 Or. 77, 82 (79 Pac. 335); *Brix* v. *Clatsop County*, 46 Or. 223 (80 Pac. 650); *Cunningham* v. *Umatilla County*, 57 Or. 517, 519 (112 Pac. 437, 37 L. R. A. (N. S.) 1051); *Andrews* v. *Neil*, 61 Or. 471 (120 Pac. 383, 123 Pac. 32); *Bowers* v. *Niel*, 64 Or. 104 (128 Pac. 433); *Wingate* v. *Clatsop County*, 71 Or. 94 (142 Pac. 561); *Stoppenback* v. *Multnomah County*, 71 Or. 493 (142 Pac. 832). The obvious purpose of Section 11 is to broaden the prohibition of Section 10 and to include in the prohibition a kind of indebtedness not previously included. Manifestly, Section 11 is designed to include a class of indebtedness which the courts had previously said that Section 10 did not include. The extent of the enlargement of the prohibition is made plain and certain by expressly extending Section 10 to debts "created in the performance of any duties or obligations imposed upon counties by the Constitution or laws of the state." This language needs no extraneous words to aid in its construction, for it is unambiguous and self-construing. To hold that Section 11 does not apply to any involuntary indebtedness would be to deny the indisputable meaning of the clearest language. Standing alone, Section 10 applies to voluntary indebtedness; but, when aided by Section 11, it also applies to involuntary indebtedness, or debts created in the performance of duties and obligations imposed by the Constitution or laws of the state. Aside from the exceptions expressly specified

by the Constitution, a county is absolutely prohibited from incurring an indebtedness in excess of $5,000.

While it is not necessary to seek information outside the plain language found in Sections 10 and 11, yet it may be of more than passing interest to call attention to the discussions appearing in the public prints, prior to November 7, 1916, concerning the origin and purpose of the amendment to the Constitution. An organization known as the State Taxpayers' League caused the amendment to be framed and circulated the petitions for its submission to the voters. The pamphlets printed by the state and sent to all the voters expressly stated that the amendment had been "Initiated by State Taxpayers' League"; and, furthermore, a printed argument made by the State Taxpayers' League in behalf of the amendment appeared in the voter's pamphlet. A monthly newspaper called "The Tax Liberator" was the avowed official publication of the Oregon Taxpayers' League. Copies of the paper are on file with the Oregon State Library. The publishers of this paper proclaimed that one of the purposes of the amendment was to place a limit on the power of disbursing officers to incur indebtedness. An extract from an editorial appearing in "The Oregon Voter," a weekly publication, and republished on page two of the July, 1916, issue of the Tax Liberator reads thus:

"Emergencies there will be, requiring immediate, heavy expenditure. This applies to public as well as private business. The private business man knows that his income is limited; yet he must be ready to meet emergencies, and must take care of himself when they arise. The public bodies must learn the same lesson, they must learn that they must arrange public finances within the limit of income in such a way that emergencies can be met when they arise. This will

require saving and trimming in advance the same as a farmer or other man in private business must do. Facing a limit beyond which expense must not go will result ultimately in more careful financing and ample provision for emergencies. Absence of any limit simply results in adding the emergency expense to present running expenses, regardless of the size of the increased burden upon taxpayers."

Moreover, in answer to the argument that the proposed amendment would not be workable, the sponsors for the amendment claimed that in framing it they had "exactly followed the principles of the Colorado law which has proven to be most workable and entirely satisfactory to all concerned." Page 7, October, 1916, issue of The Tax Liberator. In this connection it is interesting to note that the Constitution of Colorado provides that

"the aggregate amount of indebtedness of any county, for all purposes, exclusive of debts contracted before the adoption of this Constitution, shall not at any time exceed twice the amount above herein limited, unless when, in manner provided by law, the question of incurring such debt shall, at a general election be submitted to"

the qualified electors. One Rollins held warrants issued by Lake County, one of the counties of Colorado, for the ordinary expenses, such as fees for witnesses and jurors, election costs, and charges for the board of prisoners. Rollins sued Lake County on the warrants. The county defended by contending that the warrants were void because issued after the county indebtedness had reached the limit fixed by the Constitution. The controversy finally reached the supreme court of the United States and it was there argued, as it has been here, that the prohibition expressed in the Constitution did not apply to "compulsory obligations"; but that

court sustained the defense made by the county and refused to assent to the argument that the Constitution recognized a difference between indebtedness incurred by the voluntary contracts of the county and that form of debt denominated as "compulsory obligations": *Lake County* v. *Rollins,* 130 U. S. 662 (32 L. Ed. 1060, 9 Sup. Ct. Rep. 651).

At the hearing, we were urged to adopt a construction which would enable counties to incur involuntary indebtedness, and in support of this plea it was argued that counties may at times experience difficulty in adequately performing the duties imposed upon them without exceeding the $5,000 indebtedness limitation; and, furthermore, it was suggested that some county may at some time in the future find itself temporarily weakened, or even paralyzed, by the restrictions laid upon it by Article XI, Section 11 of the Constitution. This argument is best answered by quoting the language employed by Mr. Justice LAMAR when disposing of a similar argument advanced against the Colorado Constitution in *Lake County* v. *Rollins,* 130 U. S. 662, 672 (32 L. Ed. 1060, 9 Sup. Ct. Rep. 651):

"If it was a mistaken scheme, if its operation has proved or shall prove to be more inconvenient than beneficial, the remedy is with the people, not with the courts."

4, 5. Questions of policy and questions of what is best to insert in the Constitution must be regarded as having been conclusively settled when the legal voters adopted the amendment. The oath of the judiciary is to construe the Constitution as it is, and not as it might have been: *Hagan* v. *Commissioners Court of Limestone County,* 160 Ala. 544 (49 South. 417, 37 L. R. A. (N. S.) 1027); Gray on Limitations of Taxing Power and Public Indebtedness, § 2055.

However, this amendment to our Constitution does not involve a novelty, nor does it present an untried experiment. The Constitutions of some of the other states contain similar provisions, which, when presented to the courts for interpretation, have been construed to apply to both voluntary and involuntary indebtedness: *People* v. *May,* 9 Colo. 80 (10 Pac. 641); *Barnard & Co.* v. *Knox County,* 105 Mo. 382 (16 S. W. 917, 13 L. R. A. 244); *Grand Island & N. W. Co.* v. *Baker,* 6 Wyo. 369 (45 Pac. 494, 71 Am. St. Rep. 926, 34 L. R. A. 835); Gray on Limitations of Taxing Power and Public Indebtedness, § 2059.

6. Any debt contracted by Curry County in holding the special election would be an involuntary indebtedness incurred in the performance of a duty and obligation imposed by a law of the state; and therefore such a debt is prohibited if it exceeds the $5,000 limitation fixed by the Constitution. The organic law prevents the county from voluntarily assuming the debt and it also restrains the legislature from compelling the county to assume the debt if the maximum limit of indebtedness will be exceeded: *Lake County* v. *Rollins,* 130 U. S. 662 (32 L. Ed. 1060, 9 Sup. Ct. Rep. 651); 7 R. C. L. 952.

The next question for determination is whether, on the admitted facts, the special election will create an indebtedness in excess of $5,000. It will not be necessary to decide whether Article IX, Section 3 of the Constitution applies to the taxes levied for roads and schools; but for the purposes of this investigation we shall assume that the legislature cannot divert tax moneys levied for state or school, or road purposes: see *Northup* v. *Hoyt,* 31 Or. 524, 528 (49 Pac. 754); *Shattuck* v. *Kincaid,* 31 Or. 379, 394 (49 Pac. 758); *Miller* v. *Henry,* 62 Or. 4, 10 (124 Pac. 197, 41 L. R. A.

(N. S.) 97); *Guest* v. *City of Brooklyn,* 8 Hun (N. Y.), 97; *Mason* v. *Purdy,* 11 Wash. 591 (40 Pac. 130). We shall, therefore, first exclude all taxes levied for the state and also those levied for schools, roads and bridges. The remainder of the levy was for "county tax, general 4.1 mills." This levy will produce $19,037.60 for general county purposes.

7. Although the record does not reveal how much of the levy for general county purposes has actually been collected, nevertheless, after the levy is made the payment of the taxes is regarded as a legal certainty and for that reason our calculations must assume that Curry County has collected $19,037.60 for general county purposes: *Municipal Security Co.* v. *Baker County,* 33 Or. 338, 347 (54 Pac. 174). The record does not show how much of this amount has already been expended; but it is fair to assume that only such sum has been paid out as is proportionate to the expired portion of the year.

8. It is true that the budget shows that the county plans to expend the whole amount raised for general county purposes; and if the county carries out its plans it will be impossible to hold the special election without exceeding the $5,000 indebtedness limitation. In other words, if the county is permitted to do what it has planned to do it will pay out all the tax money for the items mentioned in the budget and there will be no money available to pay the cost of the election. The legislature, however, by the enactment of Chapter 422, Laws 1917, has in effect said to Curry County:

"If your plans require all your money, then you must change your plans; and, instead of using all your money as you have planned, you must set aside a sufficient sum to pay for the special election and only the balance remaining is available for your plans":

Miller v. *Henry*, 62 Or. 4, 7 (124 Pac. 197, 41 L. R. A. (N. S.) 97.)

Some of the items appearing in the budget are for voluntary purposes while the others are for involuntary obligations; and most of the involuntary obligations were originally imposed by the legislature. The legislative authority which imposed most of the involuntary obligations included in the budget, also created the duty of holding the special election; and the duty lately created is not necessarily of a lower rank than the obligations previously imposed. If there is not enough money to pay for both the voluntary and involuntary items, the latter will of course take precedence over the former; and if perchance because of a lack of funds the county cannot perform all the obligations imposed upon it without exceeding the debt limitation, nevertheless the necessity of obeying the Constitution is paramount and controlling.

However, it is not probable that the expenditure of $1,200 for the special election will be followed by the direful consequences suggested by the answer. The pleadings do not mention and no account has been taken of the revenues coming to the county from sources other than taxes. The fees paid to the various county officers for the county during the year undoubtedly aggregate a considerable sum and probably are more than enough to pay for holding the special election. If the income from fees and other sources aside from taxes, is sufficient to pay for the election then all the general county taxes will be available for the purposes mentioned in the budget and the county will be able to carry out its plans without exceeding the indebtedness limitation. The answer fails to show that the Constitution will be violated if the election is

held; and therefore the demurrer to the answer was properly sustained and the petitioner was entitled to a peremptory writ commanding the defendants to prepare for the election. PEREMPTORY WRIT ISSUED.

Argued May 23, affirmed June 12, 1917.

WAKEFIELD, FRIES & CO. *v.* PARKHURST.

(165 Pac. 578.)

Assignments—Construction—Intention of Parties.

1. An order drawn on a specific fund may operate as an assignment of such fund.

[As to property subject to assignment, see notes in 2 **Am. St. Rep.** 472; 28 **Am. St. Rep.** 745.]

Assignments—Evidence—Burden of Proof.

2. The burden is upon one alleging that a fund has been assigned to him to prove that fact, and that the alleged assignor parted with control over the fund.

Assignments—Evidence—Sufficiency.

3. A letter written by the lessee of buildings appointing a corporation his agent to collect rents of buildings named, and authorizing such agent, after paying expenses of operation, to turn over the balance to the owner, was not an assignment of the fund to the owner, but was an instruction to the agent as to disposal of the fund, which direction could be modified or revoked, although the lessee later recognized his moral obligation to apply his rentals to the payment of his debts to the owner.

From Multnomah: GEORGE N. DAVIS, Judge.

Department 1. Statement by MR. JUSTICE MCCAMANT.

This is an interpleader suit brought by Wakefield, Fries & Company, a corporation, to determine the ownership of a fund in its hands. The right of interpleader is admitted by the defendants. The controversy is between the appellant, Alfred L. Parkhurst, and the respondents, Chamberlain, Thomas & Kraemer.

It appears from the record that Parkhurst is the owner of lots 1 and 4 in Block 18 of Couch's Addition to the City of Portland; that the defendant Moumal was his lessee; that Moumal had sublet the premises to sundry tenants; that in March, 1915, Moumal was in arrears in a considerable sum in the payment of the rent due Parkhurst; that the latter was demanding payment of this debt. A conversation was had about March 15th between Mr. L. E. Crouch, attorney for Parkhurst, and the defendant Moumal. Moumal expressed his willingness at this interview to turn over the lease or the rentals accruing to him from the premises and Mr. Crouch insisted that this should be done. On March 19th, several days after this interview, the defendant Moumal gave the following letter to Wakefield, Fries & Company:

"I hereby appoint you my agent for the purpose of collecting all of the rentals from that certain building and premises situated and being upon Lots one (1) and four (4), Block eighteen (18), Couch's Addition to the City of Portland, Oregon.

"And hereby authorize and direct that you take full charge of said building and premises and rent the same out to such persons and upon such terms as to you may seem best for my interests; and that out of the funds collected by you from rentals, you will pay the necessary incidental expenses of operation, and the balance you will turn over to Alfred L. Parkhurst, as rental for said premises, under and by virtue of the lease thereof, which I hold.

"And to carry out the terms of said lease and make all the payments and fulfill all the covenants therein as far as is possible, hereby authorizing and directing you to do any and all things which are necessary or requisite to carry out the terms of said lease as fully and to the same extent as I could, or might do, if personally attending thereto."

Thereafter Wakefield, Fries & Company continued to collect the rents, turning over the net proceeds to Parkhurst. On August 30, 1915, Moumal sent the following notice to plaintiff:

"You are instructed to pay to Chamberlain, Thomas, Kraemer, Humphreys, 400–7 Chamber of Commerce Bldg. this city the money now in your hands and hereafter collected as rentals for the building owned by Alfred L. Parkhurst at Second and Couch Streets."

The defendant Moumal followed this up with an assignment, executed under date of September 9, 1915, of all moneys in the hands of plaintiff or thereafter collected by plaintiff, to Chamberlain, Thomas, Kraemer & Humphreys. On September 10th the defendant Moumal notified plaintiff in writing that its authority to collect rents for him was revoked. On August 30th the fund in the hands of plaintiff amounted to $433.32 and thereafter plaintiff collected $86. Being in doubt as to whether the defendant Moumal had the power to make a new disposition of these rentals and direct their payment to Chamberlain, Thomas & Kraemer, plaintiff paid the money into court and brought this interpleader suit. The decree of the lower court adjudged the fund to Chamberlain, Thomas & Kraemer and the defendant Parkhurst appeals. AFFIRMED.

For defendant and appellant there was a brief and an oral argument by *Mr. L. E. Crouch.*

For defendants and respondents there was a brief over the name of *Messrs. Chamberlain, Thomas & Kraemer,* with an oral argument by *Mr. Otto J. Kraemer.*

No appearance for plaintiff and respondent.

MR. JUSTICE MCCAMANT delivered the opinion of the court.

1–3. This record raises one controlling question: Did Moumal's letter of March 19, 1915, operate as an assignment of the rentals to be collected in the future by plaintiff? Did he thereby lose control over the fund to such extent as to nullify his subsequent attempt to divert the fund to payment of a debt which he owed Messrs. Chamberlain, Thomas & Kraemer? It has been repeatedly held by this court that an order drawn on a specific and clearly designated fund may operate as an assignment of such fund: *McDaniel* v. *Maxwell,* 21 Or. 202, (27 Pac. 952, 28 Am. St. Rep. 740); *Willard* v. *Bullen,* 41 Or. 25, 33 (67 Pac. 924, 68 Pac. 422); *Morris* v. *Leach,* 82 Or. 509, 511 (162 Pac. 253). In *Commercial National Bank* v. *Portland,* 37 Or. 33, 39 (54 Pac. 814, 60 Pac. 563), an order was held ineffectual to operate as an assignment of the fund involved in that case. The question is one of intention of the parties: *Pacific Coast Co.* v. *Anderson,* 107 Fed. 973, 977 (47 C. C. A. 106). In 3 Pom. Eq. Jur. (3 ed.), Section 1282, it is said:

"A mere letter, communication, or other mandate to the agent, depositary, or debtor, directing him to pay the fund to a designated person, will not of itself operate as an assignment, but it may be withdrawn or revoked at any time before the arrangement is completed, by information given to the intended payee by or on behalf of the drawer. What shall amount to the present appropriation which constitutes an equitable assignment is a question of intention, to be gathered from all the language, construed in the light of the surrounding circumstances."

In the light of the principles announced in these authorities can we gather from the letter of March 19, 1915, an intention on the part of the defendant

Moumal to assign the rentals to be collected from his tenants, and to surrender at that time dominion over the fund arising from such collection? It is true that there was a debt owing from Moumal to Parkhurst. It is also true that Moumal recognizes a moral obligation to apply his rentals on the payment of this debt. He testified, "the money belonged to Mr. Parkhurst, it didn't belong to me," "I considered the money belonged to the building, and the building belonged to Mr. Parkhurst." On the other hand, the letter was not given to Mr. Parkhurst or his attorney. It was handed to Wakefield, Fries & Company several days after Mr. Parkhurst's attorney had asked for an adjustment of the matter.

In its form the letter is a mere mandate or instruction to Mr. Moumal's agent, directing the latter to dispose of Moumal's funds in a particular way. Such a direction may ordinarily be modified or revoked. It is true that plaintiff was collecting rentals for the defendant Parkhurst, but Mr. Moumal testifies he selected plaintiff to act in the premises for other reasons; he had known the plaintiff firm for fifteen years; being about to leave for Alaska and being unable to give personal attention to the matter, he selected plaintiff to perform the service specified in his letter of March 19, 1915. Mr. Moumal further testifies clearly and emphatically that at the time when the letter of March 19th was given to plaintiff, Mr. Guild, secretary of plaintiff, expressly stated that the letter could be recalled and the authority revoked at any time. Mr. Guild does not deny this testimony.

Moumal's testimony that the fund belonged to Parkhurst proves that at the time of the trial he recognized the injustice done Parkhurst by the diversion of the fund to other purposes; this testimony cannot in-

fuse into his letter of March 19, 1915, a vitality which it does not possess. The intention which is material in the construction of this instrument is the intention at the time when it was given. The burden devolved upon the defendant Parkhurst to prove that the fund in question had been assigned to him, and that Moumal had parted with control over it. We think that the lower court did not err in its conclusion that the defendant Parkhurst failed to sustain this burden. The decree is affirmed. AFFIRMED.

MR. CHIEF JUSTICE MCBRIDE, MR. JUSTICE BEAN and MR. JUSTICE HARRIS concur.

Argued May 16, affirmed June 12, 1917.

WIGAN v. LA FOLLETT.

(165 Pac. 579.)

Appeal and Error—Presumption of Error—Exclusion of Testimony.

1. In the absence of evidence or tender thereof to show former statements inconsistent with witness' testimony as allowed by Sections 861, 864, L. O. L., it cannot be presumed on appeal that any such testimony was excluded to appellant's prejudice.

Witnesses—Corroboration by Unsworn Statements.

2. A witness' former statement not under oath was not competent under Sections 861, 864, L. O. L., allowing a party to show former inconsistent statements of his witness, to strengthen his evidence given in court, which was weak, although not adverse or prejudicial, but merely unsatisfactory to defendant.

[As to proof of prior contradictory statements by witness, see note in 82 Am. St. Rep. 39.]

Sales—Construction of Contract—Sale or Option.

3. Agreement relating to raising of hops by defendant and purchase thereof by plaintiff, held to be a mutual agreement, and not a mere option in plaintiff's favor, and binding plaintiffs to accept the crop if of specified quality, although the quantity was less than that named in the contract.

Sales—Construction of Contract as a Whole.

4. In construing contract of sale, the whole agreement is to be considered, and not merely one clause of it, in the light of prevailing

conditions and circumstances within parties' contemplation at the time of execution.

Sales—Question for Jury—Conflicting Evidence.

5. Where evidence was conflicting as to quality and inspection of hops which plaintiff had contracted to purchase, such questions were for the jury.

Sales—Delivery—Necessity of Notice by Seller.

6. Contract provision requiring seller to give ten days' notice of proposal to deliver was rendered ineffectual by the buyer's going to place of delivery and inspecting and refusing the crop.

Sales—Delivery—Necessity of Tender by Seller.

7. Where buyer upon inspection rejected goods, it was unnecessary for a seller to tender goods and load same as specified by contract, since this was to be done after acceptance as the buyer might direct.

Trial—Instruction—"Construction" of Contract.

8. Instruction that jury should give terms of contract for purchase of hops "such a reasonable construction" as placed upon them by persons engaged in that business, *held* not erroneous, the word "construction" referring to the evidence of the different witnesses, and not leaving to the jury the construction of the contract regardless of evidence.

Sales—Action on Contract—Instructions—Inspection.

9. Instructions submitting disputed fact as to whether buyer of hops had reasonable opportunity for inspection *held* proper.

Sales—Extent of Buyer's Inspection.

10. If buyer rejected hops after partial inspection, seller was not obliged to offer further opportunity for inspection.

Trial—Instructions—Cure by Other Instructions.

11. An instruction that seller could recover difference between amount realized from sale of hops after buyer's refusal to accept and the contract price, *held* not erroneous as giving the seller the right to sell hops for small fraction of their value when construed with other instructions.

Sales—Buyer's Refusal to Accept—Seller's Choice of Remedies.

12. Upon buyer's refusal to accept goods, the seller may keep the property subject to buyer's order after making tender thereof and sue for balance of purchase price, or may sell goods for best price obtainable and recover difference between amount obtained and contract price.

From Yamhill: HARRY H. BELT, Judge.

This is an action by the firm of Wigan, Richardson & Company, a partnership, against C. M. La Follett and J. D. Isham to recover the advances made by plaintiffs to the defendants under a contract for the sale

and purchase of a certain grade and amount of hops. The plaintiffs being dissatisfied with the amount of the judgment they recovered in the lower court, have appealed. Affirmed.

Department 2. Statement by MR. JUSTICE BEAN.

On account of the failure of the defendants to raise the quantity and quality of hops described in a certain contract of sale, plaintiffs brought this action to recover the sum of $2,100, advances made by them to the defendants for the purpose of raising the hops. The agreement was executed March 10, 1913, and the material part necessary to detail here provided that the defendants, mentioned therein as the "vendor," should complete the cultivation of about 20 acres of land then set out to hops on the farm of defendant C. M. La Follett, situated at Wheatland, Oregon, harvest, cure, and bale the hops grown thereon in the years 1913, 1914, 1915, 1916 and 1917, in a careful and husbandman-like manner, bargain and sell, and between the first and thirty-first days of October of such years deliver to the plaintiffs, designated in the contract as the "purchaser," at the agreed price of 14 cents per pound, 30,000 pounds of hops to be grown upon such premises "in bales of about 185 to 205 pounds each, in new 24-ounce bale cloth five pounds tare per bale to be allowed, in entire lots f. o. b. boat, at Wheatland, Oregon," as the purchasers might direct. Such hops were not to be of the first year's planting nor affected by spraying or mold, to be of good color, fully matured, cleanly picked, free from damage by vermin, and in good order and condition, otherwise known as "prime quality," and the purchasers were to have preference and selection both as to the quantity and quality over

all other persons who might thereafter make contracts in relation to said hops. It was also stipulated:

"That the vendor shall serve notice in writing on the purchaser, or his authorized agent, at Salem, Oregon, at least ten days before the date on which the vendor proposes to tender the delivery of said hops; but such notice shall not be sent until the entire lot is actually in bale and ready for delivery."

The purchasers agreed to buy 30,000 pounds of said hops and pay fourteen cents for each pound thereof, less advances made and interest thereon, conceding the right of the plaintiffs to inspect the same before acceptance, and of accepting

"any part less than the whole of the hops so bargained should for any cause the quantity of hops of the quality, character, and kind above described and which shall be raised, picked and harvested from said premises and tendered to him for acceptance be less than the amount bargained for."

It was further provided that to enable the vendors to cultivate and harvest the crop, seven cents for each pound of hops which might be grown upon said lands, not exceeding $2,100 of the purchase price, should be advanced, $600 about April 1, and $1,500 on or about September 1, for each contract year. Paragraph V of the contract is in part as follows:

"The parties hereto further agree that should any breach be made in the terms of this contract by the Purchaser, the Vendor not being in default, the Vendor may recover from the Purchaser, as liquidated damages, a sum equal to the difference between $4200.00 and the value of Thirty (30,000) thousand pounds of hops of the quality and in the condition above specified and hereby contracted, at the market price thereof in Salem, Oregon, on October 31, 1913, 1914, 1915, 1916, 1917, less the amount of all advances made by the Purchaser to the Vendor by the terms of this agreement,

with interest thereon at the rate of six per cent per annum, and the Purchaser agrees to pay the said damages on demand, and should any breach be made in the terms of this contract by the Vendor, the Purchaser not being in default, the Purchaser may recover from the Vendor, as liquidated damages, a sum equal to the difference between $4200.00 and the value of Thirty (30,000) thousand pounds of hops of the quality and in the condition above specified and hereby contracted, at the market price thereof in Salem, Oregon, on October 31, 1913-14-15-16-17, and in addition thereto all moneys which the Purchaser may have advanced to the Vendor in pursuance hereof and interest on the advances as above provided, and the Purchaser agrees to pay the same upon demand [here follows a provision that the purchasers shall have a lien upon the hops as security for the advances which they may make and for such damages as they may sustain by reason of the default of the vendor and authorizes them to foreclose the same as a mortgage if such default be made]; but the Vendor shall not be responsible for any default in the provisions of this contract, except to repay advances and interest, by reason of the shortage of the crop of hops to be raised upon said premises, if such shortage be occasioned by unfavorable seasons and could not be, for this reason, prevented by him.

"Provided, however, that nothing in this agreement contained shall be construed as a waiver by either party of the right to sue for the specific performance of this agreement, or as the exclusion or waiver of any other right or remedy which such party may have at law or in equity, or which may be vouchsafed him by this agreement. * * "

In pursuance of this contract plaintiffs advanced to defendants the sum of $600 on April 1, 1914, and $1,500 on September 1, 1914. In that year defendants raised and harvested from the farm described 28,085 pounds of hops. The plaintiffs claim that these hops were not of the quality specified in the contract, but

were moldy, not cleanly picked, not of good color, and were broken and the product of the first year's planting; that they were of the grade designated by the hop trade as "commons" and "mediums." After the hops were baled and stored in defendant La Follett's warehouse the agents of the plaintiffs went to his farm for the purpose of inspecting and, as they contend, of accepting and paying for the hops. They inspected eight samples at this time which, according to their contention, proved to be uncleanly picked, broken, moldy, and not of the quality described in the agreement. They assert that further privilege of inspection was denied them unless they would consent to accept the whole of the hops. Plaintiffs duly demanded a return of the $2,100 which was refused by the defendants. Consequently, on November 4, 1915, plaintiffs commenced this action setting forth the contract, asserting the breach of the same, the advances made, the failure of the defendants to raise the quality or quantity of hops specified therein and their failure to permit the plaintiffs to inspect the hops.

The defendants filed an answer admitting the advances, denying that the hops did not comply with the quality stipulated in the contract, or that they refused to permit the plaintiffs to inspect said hops, and denying any failure on their part to fulfil the terms of the agreement, and alleging as a further answer and counterclaim that they fully performed the contract on their part and produced 28,085 pounds of hops; that plaintiffs inspected the same on October 31st of that year and arbitrarily and wrongfully rejected them, after which the defendants sold the hops at the best price obtainable, to wit, $1,936. They further allege that they sustained general damages in the sum of $1,000; that they were entitled to a commission of $140

for selling such hops, and pray for a judgment of $1,050.90.

A reply was filed putting in issue the allegations of the answer. The action was tried to the court and jury resulting in a verdict in favor of the plaintiffs for $104.10. From a judgment entered thereon plaintiffs appeal, assigning errors. AFFIRMED.

For appellants there was a brief over the name of *Messrs. McNary, Smith & Shields,* with oral arguments by *Mr. John H. McNary,* and *Mr. Roy Shields.*

For respondents there was a brief over the names of *Messrs. Carson & Brown* and *Messrs. McCain, Vinton & Burdett,* with oral arguments by *Mr. Thomas Brown* and *Mr. W. T. Vinton.*

MR. JUSTICE BEAN delivered the opinion of the court.

The first contention made by the plaintiffs is that the court erred in its refusal to permit W. B. Magness, a witness for the plaintiffs, to answer a question asked for the purpose of laying the foundation for showing that the witness had made contradictory statements. Referring to the time of the inspection of the hops in question this witness testified as follows in answer to interrogatories by plaintiffs' counsel:

"Q. You may state whether or not there was mold in this sample?

"A. There was a light trace of mold, three or more berries.

"Q. Did Mr. La Follett look at this sample?

"A. Not that I know of. * *

"Q. How many berries did Mr. Durbin show you that were moldy?

"A. Two or three, I couldn't say exactly. * *

"Q. Didn't Mr. Durbin show you off the top of the sample, some hops that were moldy?

"A. I couldn't say whether he showed me hops off the top or whether he split that sample, I couldn't say. I forget.

"Q. Didn't you tell me yesterday about noon in the office of Mr. Conner of this city, there being present Mr. Shields, Mr. Durbin and myself and Mr. Conner's stenographer, that Mr. Durbin showed the samples that he drew, the last sample rather, and asked you to look at it and that you did look at this sample and you found lots of black mold in the top of it.

"A. No, I never told you I found lots of black ——."

Objection being made by counsel for defendants to such question the court sustained the same. The witness had, however, practically answered it and such answer was not withdrawn from the consideration of the jury, nor was any motion made to strike out the same. It is the contention of the plaintiffs that they were surprised by the unfavorable impression created by the last answer of the witness; that the purpose of the question was twofold: first, to refresh the mind of the witness in order that he might correct his testimony or, second, if denied, to permit the plaintiffs to produce other evidence excusing their mistake in calling him, and thereby destroy the effect of his adverse testimony.

The party producing a witness is not allowed to impeach his credit by evidence of bad character, but he may contradict him by other evidence and may show that he has made at other times statements inconsistent with his present testimony as provided by Section 864: Section 861, L. O. L.

1, 2. Under the conditions disclosed by the record it would seem that the plaintiffs would have been entitled to other evidence, if such could have been produced, to show that the witness had at the time indicated made a statement inconsistent with the testimony he had

given. In the absence of such evidence or tender thereof it cannot be presumed that there was testimony excluded to the prejudice of the plaintiffs. Error is not inferred. But there is a stronger reason why no error appears in this connection. The statement of the plaintiffs' witness, made at another time and not under oath, was not competent to strengthen the evidence given on the stand which was weak though not strictly speaking adverse or prejudicial to the plaintiffs. It was unsatisfactory to the plaintiffs. The witness testified that he saw "a light trace of mold on three or four berries." This did not serve as a foundation for the introduction of unsworn declarations made at another time by the witness, who was not a party to the action, as direct proof to substantiate the fact that the hops were affected by a lot of black mold. To admit such declarations would be going farther than the code intends or permits. This question is fully discussed in the following cases: *Langford* v. *Jones,* 18 Or. 307, 326 (22 Pac. 1064); *State* v. *Steeves,* 29 Or. 85, 103, 104 (43 Pac. 947); *Dillard* v. *Olalla Min. Co.,* 52 Or. 126, 134 (94 Pac. 966, 96 Pac. 678); *State* v. *Yee Gueng,* 57 Or. 509, 515 (112 Pac. 424); *Rhodes* v. *State,* 128 Ind. 189 (27 N. E. 866, 25 Am. St. Rep. 429). There was no error in the ruling of the court in this respect.

3. The second and third assignments of error relate to the refusal of the court to strike out all evidence in support of the defendants' counterclaim and to eliminate the same from the consideration of the jury and the refusal of the court to direct a verdict in favor of plaintiffs as demanded in the complaint. These two assignments may be considered together, because if the defendants' counterclaim fails then the plaintiffs are entitled to the full amount of the advances made.

In the first place the plaintiffs submit that the defendants failed to perform the contract by raising only 28,085 pounds of hops, or less than 30,000, the stipulated amount. By reference to the contract we find:

(1) "The purchaser, to have and there is hereby conceded to him the right of inspecting the same before acceptance and of accepting any part less than the whole of the hops so bargained should for any cause the quantity of hops of the quality, character and kind above described and which shall be raised, picked and harvested from said premises and tendered to him for acceptance be less than the amount bargained for"; (2) the entire crop, whatever the amount, is mortgaged to secure the advances the purchaser may make, and such damages as he may sustain by reason of the default of the vendors, and the agreement authorizes a foreclosure and allows attorney's fees therefor in the event of such default; (3) the agreement further provides that "the vendor shall not be responsible for any default in the provisions of this contract, except to repay advances and interest, by reason of the shortage of the crop of hops to be raised upon said premises, if such shortage be occasioned by unfavorable seasons and could not be, for this reason, prevented by him."

To begin with it seems that the contract is a mutual one and binds the purchasers to accept and pay for the crop raised on the premises, as well as the vendors to sell the same although there should be less than 30,000 pounds, the maximum amount bargained for. It was a mutual adventure. It is not a mere option in favor of the purchasers. The clause relating to the purchasers' accepting less than the number of pounds named appears to be worded thus in order to provide for the acceptance of such part of the crop raised as is of the quality specified in the contract and for the rejection of the balance.

The clause providing that the seller shall not be responsible for any default, except to repay advances and interest, by reason of the shortage of the crop of hops occasioned by unfavorable seasons and without the fault of the vendors is the closing part of the paragraph containing the various stipulations that should prevail in the event of any breach of the contract, and modifies the whole of such covenants as to a breach on the part of the sellers. The fair intendment of the latter clause is to absolve the vendors from any fault on account of such a failure to raise the full amount named, if they should exercise an ordinary degree of care and skill in the production of the hops and make an honest effort to produce the 30,000 pounds, although the crop might be short of that amount of contract hops. The trial court properly instructed the jury to this effect over the objection and exception of counsel for plaintiffs: See *Livesley* v. *Johnston,* 45 Or. 30, 52 (76 Pac. 946, 106 Am. St. Rep. 647, 65 L. R. A. 783); *Lachmund* v. *Lope Sing,* 54 Or. 106 (102 Pac. 598); *Kinzer Const. Co.* v. *State,* 125 N. Y. Supp. 46; *Stewart* v. *Stone,* 127 N. Y. 500 (28 N. E. 595, 14 L. R. A. 215); *Buffalo etc. Co.* v. *Bellevue Land & Impr. Co.,* 165 N. Y. 247 (59 N. E. 5, 51 L. R. A. 951); *Ontario etc. Co.* v. *Cutting Fruit Packing Co.,* 134 Cal. 21 (66 Pac. 28, 86 Am. St. Rep. 231, 53 L. R. A. 681).

The agreement as to advances refers to "seven cents for each pound of hops which may be grown on said lands and which are by this agreement to him bargained and sold," and then names the maximum amount. Why this surplusage or dual stipulation, if it was not contemplated that less than the larger number of pounds mentioned would be raised and delivered? Moreover, the plaintiffs have by their

own conduct and declarations, as shown by the evidence, placed such a construction upon this part of the contract, for when their agents went to the La Follett farm October 31, 1914, and inspected the hops there was no controversy about the quantity of the crop. The dispute arose over the quality. The plaintiffs, according to the statement they then made, were willing to accept and pay for all the hops which were up to the standard specified by the agreement. It is true that the contract states as a general rule of damages the difference between a certain sum and the market value of the maximum amount of the hops mentioned thereon. In the event of there being a less quantity raised, by computation this rule is easily applied.

4. In making a memorandum of the agreement the parties used a lengthy, ready-made form in print, adapted to nearly all conditions. In construing the same it is not a question as to what one clause of it indicates, but what the whole agreement means, viewed in the light of the prevailing conditions and circumstances which were within the contemplation of the parties thereto at the time of its execution. It is the contention of the plaintiffs that the non-liability clause only refers to the matter of damages which might be claimed by them. According to the construction which we have given to the contract it is incumbent upon the plaintiffs to carry out the same, unless there is a default on the part of the vendors; in other words, if the defendants, as claimed by plaintiffs, should be deprived of the benefit of their contract they would within the meaning thereof become responsible for a default by reason of a shortage of the crop which, as the evidence tended to show could not have been prevented by them, and held

liable for a portion of the penalty. This would not be in accordance with the agreement of the parties.

5. The motion on behalf of the plaintiffs for a directed verdict for the amount claimed by them depended upon the evidence in support of defendants' counterclaim. That introduced on the part of the latter tended to show that during the year 1914 they cultivated, picked, cured and baled in a careful and husbandman-like manner on the premises named in the agreement 28,085 pounds of "prime hops" of the kind specified in the contract and had the same in the storehouses of defendant La Follett at Wheatland, Oregon, in good order and condition, on October 31, 1914; that at this time plaintiffs' agents went to the warehouse and stated to Mr. La Follett on behalf of plaintiffs that "we've come down to take in your hops"; that they inspected the hops, examining samples taken from eight bales; stating they could not take them as they did not suit them and were not up to the contract, but that they would pay two cents more than anyone else for them; that defendant La Follett tendered the hops to the plaintiffs and demanded the money for them; that this offer was refused by plaintiffs who arbitrarily rejected the hops in violation of their contract. Such was the evidence to sustain the allegations of defendants' affirmative answer. The testimony on behalf of plaintiffs, which is in direct conflict with the main part of defendants' evidence, tended to show that the agents of the plaintiffs went to Mr. La Follett's farm on the day mentioned, the last day for the delivery of the hops as per the contract, for the purpose of inspecting, accepting, and paying for the hops in question according to the terms of the contract; that the hops were "dirty picked" and moldy, "not a sprinkling of

mold, but moldy"; that they were not prime hops but were "poor mediums to mediums"; that plaintiffs' agents stated that they proposed to take all the hops that came up to the terms of the agreement as to quality and that they were there for that purpose; that there were two ways of settling the matter, one was for plaintiffs to pay two cents a pound more than any other dealer, or the propositon of absolutely rejecting the hops; that they did not accept the hops for the reason that they did not find any "prime hops." There were several witnesses and considerable testimony on both sides. There was a direct conflict in the evidence raising a question for the determination of the jury; therefore, there was no error in the refusal of the trial court to direct a verdict in favor of the plaintiffs for the amount demanded.

There was also a dispute as to the matter of inspection of the hops which stands upon the same footing as the quality of the crop. The question was properly submitted to the jury. By their verdict they found that the hops were "prime hops" as specified in the agreement; that the plaintiffs had a fair opportunity to inspect them and wrongfully rejected them, thereby breaching their contract.

There was some evidence, now complained of by plaintiffs, that some of the hops tendered were "baby hops" or the product of the first year's planting, but the defendants' testimony indicated that a few hills were reset where some had died, and the jury found that the quantity of young hops did not lower the whole crop below the standard of "prime hops." This disposes of that contention.

6, 7. It is also suggested by plaintiffs that the defendants were required to give them ten days' notice of their proposal to deliver the hops. This provision was

rendered ineffectual by the plaintiffs going to the place stipulated for the delivery, and inspecting the crop, declaring that they were ready to accept them if they were in accordance with the specifications of the contract. They were there, therefore no notice to bring them to the place would have been of any avail. The evidence on both sides tended to show that the plaintiffs went to the warehouse at Wheatland to inspect and pass upon the quality of the hops, and the only bone of contention involved the quality of the crop. The purchasers agreed to pay for the hops "after the delivery and acceptance thereof by him at Wheatland, Oregon": 4 Enc. Pl. & Pr. 629. If, as the jury found from the testimony, the plaintiffs rejected the hops, it was unnecessary and would have been futile for the vendors to have loaded the same on to the boat. This was to be done after the acceptance, as the buyers might direct. They did not so order: See *Livesley* v. *Krebs Hop Co.,* 57 Or. 352 (107 Pac. 460); *Catlin* v. *Jones,* 48 Or. 158 (85 Pac. 515); *Krebs Hop Co.* v. *Livesley,* 55 Or. 227 (104 Pac. 3).

8. It is insisted by plaintiffs that they were entitled to an instruction to the jury with reference to the quality of the hops. This is granted. The court charged the jury upon this phase of the case as follows:

"This action is brought upon a written contract which has been introduced in evidence, and which the court will consider and construe, and you are bound to follow the construction which the court places upon the written contract, for that is the law, * * Now as to the quality of these hops contracted to be delivered, the contract says that these hops, first, are not to be the product of the first year's planting, second, not to be affected by spraying or mold, third, they should be of good color, fully matured, cleanly picked, fourth, free from damage by vermin, properly dried and

cured, not broken, in good order and condition; otherwise known as prime quality. You are to accept the definition of prime quality as laid down in this contract by the parties themselves. You are, however, to consider these terms as used in this contract in the ordinary meaning and acceptation of those terms. You are to give them such a reasonable construction and meaning as are placed upon them by persons who are engaged in the hop business."

The plaintiffs criticise the latter part of this instruction and urge that it would have the effect of leaving to the jury the construction of the contract. We do not think the charge taken as a whole would have that effect. In other words, the latter sentence of the instruction containing the word "construction" refers to the evidence of the different witnesses in the case who were growers and buyers of hops, several of whom had been in the hop business for a number of years. These witnesses fully explained and discussed pro and con the different classifications of hops, including the kind named in the agreement, so that as applied to the evidence we do not believe it was possible for the jury to misunderstand or be misdirected by the charge which, as we read it, is plain and was proper. The point is not well taken. It was in strict conformity with the rule announced by Mr. Justice McNARY in *Netter* v. *Edmunson*, 71 Or. 604, 614 (143 Pac. 636). This instruction was in substance the same as plaintiffs' request (Assignment No. VI), save as to the latter part of such request which is in conflict with the views we have expressed above.

9, 10. The evidence on the part of the defendants tended to show that the plaintiffs had all the chance to inspect the hops that they desired, and after they had examined samples taken from eight bales they in-

formed defendants they could not take the hops as they were not up to the contract. Defendant La Follett testified in effect that after such inspection and rejection he merely told the agents of the plaintiffs that "if you don't intend to take them I don't want you to go through and cut them up."

The court charged the jury upon this point in substance as follows:

"Under this contract the plaintiffs have the right of inspection of these hops at any time prior to the full performance of this contract. * * If you find from the evidence that the plaintiffs wrongfully rejected the hops and stated to the defendants that they would not accept the hops, after they had made an examination of a portion of the hops contracted to be delivered, then there would not be any obligation on the part of the defendants to offer a further opportunity for inspection, for the reason that the law does not require a party to do vain or idle things. If you believe, however, that the defendants refused the plaintiffs the right of reasonable inspection of these hops, then your verdict should be for the plaintiffs."

It appears that this disputed fact was fairly submitted to the jury. We find no error in the charge or refusal to instruct.

11, 12. As a rule of damages in the case, over the objection and exception of counsel for the plaintiffs, the court instructed the jury as follows:

"If you believe from the evidence that the plaintiffs wrongfully and arbitrarily refused to accept the hops mentioned in this contract and that such hops were of the kind and character as described in the contract, and that the defendants had performed all the conditions of the contract on their part, then your verdict should be for the plaintiffs in such a sum of money as is equal to the difference between the contract price of these hops less the amount for which the hops resold for in the open market, plus the sum

of money advanced, viz.: $2,100.00; in other words, if you believe the defendants are entitled to prevail they would be entitled as damages to the difference between the sum of money they would have received had the contract been performed and the sum of money which they actually did receive for the hops."

It is claimed by plaintiffs' counsel that under the given instructions defendants were at liberty to sell the hops for a small fraction of their value. But the court further charged to the purport that if the jury should find that there had been a default on the part of the buyers, that the growers had performed all the terms of the contract, that the buyers had refused to accept the hops, and that the hops were of the kind and character described in the contract, then the growers might treat the hops as belonging to the buyers and go upon the market and resell them for the best obtainable price; that it was the duty of the grower in this respect to act in good faith and obtain the highest and best price, and in this connection the jury should consider as to what was the market value of the hops at the time; that the defendants would be obliged to sell the hops at the market value or in excess thereof. Taking the charge as a whole we do not understand the same as argued by counsel. The case of *Daniels* v. *Morris,* 65 Or. 289, 298 (130 Pac. 397), is authority for the instruction given. In that opinion Mr. Justice BURNETT, speaking for the court, said:

"When a buyer refuses to take and pay for property offered by the seller in performance of an executory contract for the sale thereof, the latter has the choice of either of two remedies. He may keep the property on hand subject to the order of the buyer, after making tender thereof, and maintain an action for the balance of the purchase price, or he may sell the goods for the best price obtainable, and if that is

less than the contract price sue the buyer for the difference."

There was conflicting evidence upon the trial as to the market value of hops during November and the first part of December, 1914, the testimony concerning which ranged from seven to eleven cents a pound. It is also explained on behalf of defendants that the price being low during the month of November, the market was inactive, and that for a time the defendants were unable to make a sale of the hops. Their contention also is that after a crop has been rejected by a buyer it is difficult to make a sale thereof, especially in the vicinity of where the hops have been condemned; that Mr. La Follett, who attended to the sale on behalf of the defendants, was unable to make a sale in the Salem market and was obliged to seek a sale in Portland which he succeeded in making the first part of December. The jury might reasonably believe from the evidence that for the same cause a broker, in making a purchase, would exact a different grading of the product, which would account for the reason why some of the hops in question sold for seven cents, and nine bales for four cents per pound. The evidence tended to show that a fair endeavor was made on behalf of the defendants to make the best sale possible of the rejected hops, and apparently the jury so found.

From a careful reading and consideration of all the instructions given by the trial court to the jury, it appears that the questions at issue were fairly submitted to that tribunal. Finding no error in the record the judgment of the lower court is affirmed.

AFFIRMED.

MR. CHIEF JUSTICE MCBRIDE, MR. JUSTICE MOORE and MR. JUSTICE MCCAMANT concur.

Motion to dismiss denied September 19, 1916.
Submitted on briefs June 1, reversed and remanded June 12, 1917.

MILLER *v.* STATE INDUSTRIAL ACCIDENT COMMISSION.

(159 Pac. 1150; 165 Pac. 576.)

ON MOTION TO DISMISS.

Appeal and Error—Necessity of Bond—Appeal by State Commission—"Interested."

1. The state is "interested" in an appeal by the Industrial Accident Commission from an order reversing its disposition of a claim for workmen's compensation, so that no appeal bond need be filed, in view of Section 578, L. O. L., providing that the state, when a party or "interested," shall not be required to furnish bond on appeal.

ON THE MERITS.

Master and Servant—Workmen's Compensation Act—Expediting Appeals.

2. By Workmen's Compensation Act (Laws 1913, c. 112), Section 32, providing that an appeal from a decision of the Industrial Accident Commission shall have precedence over all other cases, except criminal cases, the legislature did not intend that such appeal should be expedited to the extent of disarranging the orderly transaction of business in the Circuit Court, or that cases already set for trial with witnesses under subpoena should be displaced for such purpose.

Master and Servant—Workmen's Compensation Act—Appeal to Circuit Court—Hearing De Novo.

3. Under the Workmen's Compensation Act, providing that on hearing of an appeal to the Circuit Court, the court, in its discretion, may submit to a jury any question of fact involved, and that the proceedings shall be informal and summary, but full opportunity to be heard shall be had before judgment is pronounced, on appeal to the Circuit Court from an order of the Industrial Accident Commission, the court properly considered other evidence than that submitted to the commission on the original hearing, thus making the hearing practically a *de novo* trial.

[As to review of facts on appeal under Workmen's Compensation Acts, see note in Ann. Cas. 1916B, 475.]

Master and Servant—Workmen's Compensation Act—Judgment on Appeal from Industrial Commission.

4. On appeal to the Circuit Court from an order of the Industrial Accident Commission in proceedings by an injured servant for compensation under the Workmen's Compensation Act, the court improperly entered judgment for the servant based on conclusions of law that in deciding what amount should be awarded the court was not limited to compensation as provided by the Workmen's Compensation Act; that the court was entitled to hear and consider only such testimony as would have been competent, relevant, and material had

the case been an action at law to recover damages for a personal injury; that in fixing the amount to be allowed the servant, the court was not limited by any schedules of the act, nor by any provision for monthly payments, etc.; and that in making an allowance for surgical and medical services, the court was not limited to the surgical scale established by the commission under the act.

Master and Servant—Workmen's Compensation Act—Findings of Circuit Court—Definiteness.

5. On appeal from judgment of the Circuit Court on appeal to it from an order of the Industrial Accident Commission in an injured servant's proceeding for compensation under the Workmen's Compensation Act, court's findings for the servant *held* not sufficiently definite to enable the Supreme Court to enter final judgment; the conclusions of law and judgment below being erroneous.

From Multnomah: ROBERT G. MORROW, Judge.

Proceedings by George Miller for workman's compensation before the State Industrial Accident Commission. From a judgment reversing the order of the commission, the commission appealed. On motion to dismiss the appeal. Motion denied.

Mr. Eugene Bland and *Mr. James H. McMenamin,* for the motion.

Mr. Joseph A. Benjamin, Assistant Attorney General, *contra.*

Opinion PER CURIAM.

1. This is an appeal by the defendant from a decision of the Circuit Court of Multnomah County, Oregon, reversing an order of the commission as to the validity of the plaintiff's claim for compensation for an injury sustained while he was employed as a carpenter working on a building in the City of Portland. The plaintiff's counsel move to dismiss the appeal because no undertaking has been filed. Section 578, L. O. L., reads:

"In all actions or proceedings in any court in this state in which the State of Oregon is a party, or interested therein, it shall not be required to advance any costs in any such action or proceeding; and that the

state shall not be required to furnish any bond or undertaking upon appeal or otherwise in any such action or proceeding."

The State of Oregon is interested in the orders made by its commissions, and for that reason no undertaking on appeal was necessary in this case.

The motion is denied.

MOTION TO DISMISS DENIED.

Reversed and remanded June 12, 1917.

ON THE MERITS.

(165 Pac. 576.)

In Banc. Statement by MR. JUSTICE BENSON.

While working as a carpenter upon a building in Portland plaintiff fell, striking upon his head in such a manner as to produce a partial facial paralysis. The employer and employee had both voluntarily accepted and were acting under the provisions of chapter 112, Laws 1913, commonly known as the "Workmen's Compensation Act." The plaintiff in pursuance thereof filed a claim for compensation for the injury above mentioned. After an informal investigation, the commission disallowed the claim upon the ground that the injury existed prior to the accident described. The claimant then appealed to the Circuit Court for Multnomah County where, after a hearing, a judgment was entered in favor of plaintiff from which the commission appeals.

Submitted on briefs under the proviso of Supreme Court Rule 18: 56 Or. 622 (117 Pac. xi).

REVERSED AND REMANDED.

For appellant there was a brief presented by *Mr. George M. Brown*, Attorney General, and *Mr. Joseph A. Benjamin*, Third Assistant Attorney General.

For respondent there was a brief over the names of *Mr. James H. McMenamin* and *Mr. Eugene Bland*.

MR. JUSTICE BENSON delivered the opinion of the court.

2. The first point for consideration is the fact that the trial court did not give this appeal precedence over certain other cases already set for trial upon days certain, although such cases were not a part of the criminal docket. The act under consideration in Section 32 thereof provides that "such appeal shall have precedence over all other cases except criminal cases." We cannot believe that the legislature intended that such appeals should be expedited to the extent of disarranging the orderly transaction of business in the Circuit Courts; or that cases already set for trial, with witnesses under subpoena, should be displaced for that purpose.

3. The next assignment of error challenges the power of the Circuit Court to consider other evidence than that submitted to the commission upon the original hearing. The compensation act as it existed at the time of the appeal contained among others the following provision:

"Upon the hearing of such an appeal the court in its discretion may submit to a jury any question of fact involved in such an appeal. The proceedings in every such appeal shall be informal and summary, but full opportunity to be heard shall be had before judgment is pronounced."

Under a very similar statute the Court of Appeals of Maryland in *Frazier* v. *Leas,* 127 Md. 572 (96 Atl. 764), holds that the language of the act necessarily implies the taking of testimony by the appellate court and the doctrine there announced was reiterated in *American Ice Co.* v. *Fitzhugh,* 128 Md. 382 (97 Atl. 999). We conclude that there was no error in making the hearing practically a *de novo* trial.

We come then to a consideration of the action of the court in treating the appeal as an original action for damages and giving judgment accordingly. After making findings of fact, the court also filed conclusions of law among which are the following:

"That for the injuries resulting from the fall referred to in Findings VIII the plaintiff is entitled to damages in the full legal sense of that term to the amount of $366.33 to be paid out of the fund created under the provisions of said workmen's compensation act.

"That in deciding what amount should be awarded to plaintiff, the court is not limited to compensation as provided by the statute creating the State Industrial Accident Commission, Laws 1913, chapter 112; but acts as a jury, and may take into consideration all the elements of damage that a jury might consider.

"That upon the hearing of the appeal herein the court was entitled to hear and consider such testimony only as would have been competent, relevant and material had the case been an action at law to recover damages for a personal injury.

"That in fixing the amount to be allowed to plaintiff for his injuries, the court is not limited by any of the schedules contained in said act, nor by any provision for monthly payments therein contained, nor by any of the methods provided by said act for computing compensation.

"That in making an allowance for surgical and medical services in such cases as this, the court is not

limited to the surgical scale established by the defendant commission under section 23 of said workmen's compensation act."

These conclusions were followed by a judgment for the claimant in the sum of $366.33 and the additional sum of $75 as physician's fees. We are entirely at a loss to determine the theory or authority upon which the court based such a view of the law. There is nothing in the statute itself to justify such a contention and our attention has not been called to any authority which might sustain it. Its effect would be to repeal the compensation act by the simple process of appeal. Under the provisions of the statute, an appeal from a decision of the commission does not give the appellate tribunal any new cause of action, or any different law upon which to base its judgment. The judgment is therefore clearly erroneous.

4. We have no record of the testimony taken in the Circuit Court and as to the facts of the case are limited to the findings. Upon the questions of injury and disability these findings are as follows:

"That the result of such striking of plaintiff's head as set out in Findings VIII was partial facial paralysis, so that plaintiff for a long time could not control the muscles of the left side of his face, and the control of the left eye was diminished. Such partial paralysis had largely disappeared at the time of the trial and will probably entirely pass away within a few months. During the continuance of such partial paralysis the plaintiff regularly continued at work as a carpenter on said building until it was completed, without diminution of wages. That plaintiff's face was not at all paralyzed prior to said accident.

"That at the time of the accident plaintiff was working as a carpenter, but did not habitually earn his living solely at that trade; nor was he able to find carpenter work during the entire period of his partial

facial paralysis; that during part of the period of plaintiff's disablement he worked as an itinerant vendor and canvasser.

"That said condition of partial facial paralysis to a certain extent but not entirely disabled plaintiff for the performance of the work of a carpenter for a period of several months; and entirely disabled him for a period of viz: one year as an itinerant vendor and canvasser."

5. These findings are not sufficiently definite to enable us to enter a final judgment and the cause will therefore be remanded to the Circuit Court with directions to take such further proceedings, not inconsistent herewith, as will enable that court to fix claimant's compensation in accordance with the provisions of the compensation act as it existed at the time of the hearing. REVERSED AND REMANDED.

Argued May 17, reversed orally May 22, written opinion June 12, 1917.

STATE OF OREGON ex Rel. v. BOYER, County Clerk.

(165 Pac. 587.)

Statutes—Passage—Signatures of Officers of Houses—Constitution.

1. Under Article IV, Section 25, of the Constitution, providing that a majority of all the members elected to each House shall be necessary to pass every bill or joint resolution, and that all bills or joint resolutions so passed shall be signed by the presiding officers of the respective Houses, every bill presented to the officers for their signatures shall in its entirety as presented have received the vote of a majority of the members of each House.

Statutes—Referendum by Legislature—Constitution.

2. By Article IV, Section 1, of the Constitution, the legislature can of itself refer to the people any and all laws enacted by it, provided that the act shall be first passed as other bills are enacted; less than a majority of the whole membership of the legislature having no authority to refer a bill.

Constitutional Law—Statutes—Presumption.

3. Where the journals of the legislature are silent on the subject, the supreme court will presume that the legislature observed the constitutional requirement that an amendment by one branch of the legislature was concurred in by constitutional majority of the other branch.

[As to presumption that an ordinance is valid, see note in Ann. Cas. 1916B, 502.]

Statutes—Passage as Amended—Constitution.

4. Under Article IV, Section 25, of the Constitution, providing that a majority of all members elected to each House shall be necessary to pass every bill or joint resolution, and that all bills or resolutions so passed shall be signed by the presiding officers of the respective Houses, where a bill consisting of four sections passed the House, and was sent to the Senate, and there amended by adding Section 5, providing that the act should be submitted to the people at the next general election, etc., and, as thus amended, was passed by the Senate and sent back to the House, and on the question, "Shall the House concur?" the yeas and nays were demanded, when twenty-eight voted yea, twenty-six voted nay, six were absent, and one was excused, the names of those voting and those absent or excused being entered in the journal, and the bill being signed by the Speaker of the House and the President of the Senate, the bill never passed the legislature, not having been approved in its amended shape (Laws 1917, p. 457), by a majority of the House.

From Marion: GEORGE G. BINGHAM, Judge.

The State of Oregon ex rel. Max Gehlhar, as district attorney of the State of Oregon for Marion County, brought this suit against U. G. Boyer, county clerk of the county of Marion, enjoining him as such official from placing a certain measure upon the ballot for the special election to be held on June 4, 1917. A demurrer being sustained and defendant refusing to further plead, an order was entered dismissing the suit and plaintiff appealed. Reversed and decree entered as prayed for in the complaint.

In Banc. Statement by MR. CHIEF JUSTICE MCBRIDE.

This was a suit brought in the Circuit Court to enjoin defendant from placing upon the ballot for the special election held June 4, 1917, a measure, the object and tenor of which were to require the assessors of the various counties of the state to assess certain lands

claimed by the Southern Pacific Railroad Company, the title to which has been in controversy between that company and the United States. The facts are as follows: The records of the legislative assembly show that a bill consisting of four sections passed the House on February 14, 1917, and was sent to the Senate and there amended by adding another section (numbered 5), which is as follows:

"This act shall be submitted to the people of the state of Oregon at the next general election or any special election called before such general election, and when ratified at such election shall be in full force and effect."

The bill as thus amended was passed by the Senate and sent to the House, and upon the question being put "shall the House concur" the yeas and nays were demanded. Upon the roll-call twenty-eight members voted yea, twenty-six voted nay, six were absent, and one was excused; the names of those voting as well as those absent or excused being entered in the journal. The bill was signed by the speaker of the House and President of the Senate and approved by the Governor.

The relator claims that by virtue of the provisions of Article IV, Section 25, of the Constitution the bill never became a law by reason of the fact that it did not receive a majority of the votes of the members elected to the House of Representatives. Said section is as follows:

"A majority of all the members elected to each house shall be necessary to pass every bill or joint resolution; and all bills or joint resolutions so passed shall be signed by the presiding officers of the respective houses."

The complaint recited the facts above set forth, and further alleged that the ballot title of the bill had been

duly certified to the defendant, who was about to place it upon the ballot to be voted upon at the ensuing special election, and prayed that he be enjoined from so doing.

There was a general demurrer to the complaint, which being sustained, and the plaintiff electing to stand thereon, was followed by an order dismissing the suit, from which order plaintiff appeals.

REVERSED. DECREE RENDERED.

For appellant there was a brief over the names of *Mr. Martin L. Pipes* and *Mr. Max Gehlhar,* with an oral argument by *Mr. Pipes.*

For respondent there was a brief with oral arguments by *Mr. Frank S. Grant* and *Mr. Louis E. Bean.*

Opinion by MR. CHIEF JUSTICE MCBRIDE.

Much of the argument here is based upon the proposition that the courts will not interfere to enjoin the passage of a bill on the ground that the measure is unconstitutional, and upon that point counsel cite: 14 R. C. L. 433; *Lewis* v. *Denver City Waterworks Co.,* 19 Colo. 236 (34 Pac. 993, 41 Am. St. Rep. 248); *Kadderly* v. *Portland,* 44 Or. 118 (74 Pac. 710, 75 Pac. 222); *Murphy* v. *East Portland,* 42 Fed. 308; *Chicago etc. R. Co.* v. *City of Lincoln,* 85 Neb. 733 (124 N. W. 142, 19 Ann. Cas. 207); *State* v. *Thorson,* 9 S. D. 149 (68 N. W. 202, 33 L. R. A. 582); *Pfeifer* v. *Graves,* 88 Ohio St. 473 (104 N. E. 529). In our judgment the matter so discussed is not involved in this case. The question is not whether the measure submitted would be constitutional if passed, but whether the measure has in fact passed the legislature. The provisions of the

Constitution bearing directly upon the matter at issue are:

(1) Section 25, Article IV, above quoted;

(2) Section 19, Article IV:

"Every bill shall be read by sections, on three several days, in each house, unless in case of emergency two-thirds of the house where such bill may be depending, shall, by a vote of yeas and nays, deem it expedient to dispense with this rule; but the reading of a bill by sections on its final passage shall in no case be dispensed with, and the vote on the passage of every bill or joint resolution shall be taken by yeas and nays";

and (3) the following excerpt from Section 1, Article IV, as amended June 2, 1902:

"The second power is the referendum, and it may be ordered (except as to laws necessary for the immediate preservation of the public peace, health, or safety, either by the petition signed by five per cent of the legal voters, or by the legislative assembly, as other bills are enacted."

1. On principle it would seem plain that the intent of the framers of the Constitution was that no bill should become a law without the assent of a majority of all the members elected to the legislature. Laying aside the technical and extremely refined definitions of some of the courts of the words "final passage," used in Section 19 of Article IV, *supra,* wherein it has been held that such words mean something less than the last legislative vote upon the bill in its completed form, Section 25 of Article IV is complete in itself. It provides, first, that

"a majority of all the members elected to each house shall be necessary to *pass* every bill or joint resolution"; and, second, that "all bills and joint resolutions

so passed shall be signed by the presiding officers of the respective houses."

Analyzing this section we inquire, "What bills are the officers of each House required to sign?" The answer must be, "Bills passed by a majority of the members of each House." The plain intent of the section quoted is that every bill presented to the officers for their signatures shall in its entirety as presented have received the vote of a majority of the members of each House; and to say that it means anything less or different from this would be a perversion of language and logic.

2. It is suggested that the legislature can of itself refer any or all laws enacted by it to the people, and this is true: Article IV, Section 1 of the Constitution; *Libby* v. *Olcott,* 66 Or. 124 (134 Pac. 13); *Thielke* v. *Albee,* 76 Or. 449 (150 Pac. 854). But the right of the legislature to submit a measure to the vote of the people is conditioned that the act referred shall be first passed "as other bills are enacted" (Article IV, Section 1, of the Constitution); the evident intent of the section being that less than a majority of the whole membership of the legislature should have no authority to refer a bill to the electorate.

The line of reasoning here adopted would seem to render unnecessary a consideration of what constitutes the "final passage" of a bill within the meaning of Article IV, Section 19, of the Constitution. Counsel for defendant cites authorities tending in a greater or less degree to hold that the words "final passage" have a technical signification differing from their lexicographical meaning, and that as used in our Constitution the final passage of a bill is the vote by which each House adopts a bill after it has passed the first and second readings, been read the third time, and put

on its final passage; and that after a bill has been so passed in one House and amended and passed in the other it is not necessary that a concurrence in the amendment shall be by a constitutional majority.

The first case cited by counsel is *Johnson* v. *City of Great Falls,* 38 Mont. 369 (99 Pac. 1059, 16 Ann. Cas. 974), which latter publication embraces in the note to the principal case a full citation of the authorities bearing upon the subject. The principal case does not consider the effect of a lack of a constitutional majority as affecting the validity of an amended bill, but holds that under a provision of the Montana Constitution similar to Article IV, Section 19 of our Constitution it is not necessary that the yeas and nays be taken upon such amendment. The question as to whether a failure of a constitutional majority of the members to concur in an amendment would render it invalid was not involved or considered. The principal reason given by the Montana court is that to require a calling of the yeas and nays upon concurrence would logically require in addition that the bill as amended should be read three times, and go through all the preliminaries of an original bill, and thereby delay and embarrass legislation. The first conclusion would seem to be a *non sequitur,* and as to the second it may be observed that less haste in the enactment of bills would not be an unmixed evil—perhaps a positive benefit. The other cases cited are to the same effect, and we find no case in which it appears affirmatively from the journal that the concurrence was by less than a majority of the whole membership of the concurring body. As against the views thus enunciated we find a body of decisions, fewer, perhaps, in number, but certainly logical in reasoning, which hold that the failure of a majority of the membership of the con-

curring body to vote in favor of the amendment renders the bill void. *Norman* v. *Kentucky Board of Managers, etc.*, 93 Ky. 537 (20 S. W. 901, 18 L. R. A. 557), is a case very similar to the one at bar. The following is a statement by the court of the facts and the substance of its opinion thereon:

"The act originated in the Senate, and passed that body, upon a yea and nay vote, entered upon its journal, by the required majority. It then went to the other House, where, after being amended, it passed, upon a like vote, entered upon its journal, by a like majority. It then came back to the Senate, where the amendments were concurred in without a yea and nay vote, and without the vote of a majority of the members elected. It is conceded by the counsel for the appellees, and seems plain, that this mode of proceeding did not conform to the Constitution. It complied with it in neither letter nor spirit. The object of the section above cited was to have the assent of a majority of all the members elected to each House to all the provisions of the act, and that this should appear by a yea and nay vote entered upon its journal. If a bill, after passing one House in the proper manner, and then, after amendment, passing the other House in like manner, could come back to the House in which it originated, and be adopted by a majority of those voting, or a quorum, it would defeat this object, and render the section ineffectual. Let us look at it practically. An appropriation bill of $100 originates in the Senate, and is properly passed. It goes to the House, where it is amended by making the sum $10,000, and is then properly passed by it. It returns to the Senate for concurrence, and is adopted, as amended, by a majority of those present, without a yea and nay vote. Can it be well contended that this would be a compliance with the Constitution? If so, then there being thirty-eight senators, it would require twenty, or a majority of them to pass a bill for a trifle; but, after being amended in the House so as to perhaps bankrupt the treasury,

it could be concurred in by the Senate by the votes of eleven members, or a majority of a quorum; and in case of the House, with its 100 members, it would require fifty-one to pass the bill, if it originated there, but only twenty-six, or a majority of a quorum, to concur in it after it had been changed in like manner by the Senate. Further illustration seems needless. It is true it has been held that the 'final passage' of a bill means when it first passes the body, and not when it returns to it, after amendment, for adoption; and it is said that the constitutional provision as to the number of votes, and the entry of the yea and nay vote on the journal, does not apply to amendments, or the reports of conference committees. If so, then no matter how material the change, a majority vote of a quorum may pass the bill. The words 'final passage,' as used in our Constitution, mean final passage. They do not mean some passage before the final one, but the last one. They do not mean the passage of a part of a bill, or what is first introduced, and which may, by reason of amendment, become the least important. If so, then the body may pass what is practically a new bill in a manner counter to both the letter and spirit of the Constitution. When the bill was voted on in the Senate, as amended, and after its return from the House, there never was any further action by the Senate. It was the final vote, and, therefore, its final passage; and, being so, a majority vote of all the members elected, with an entry by yea and nay vote upon the journal, was necessary to its constitutional enactment. The bill, as approved by the speakers of the two Houses and by the Governor, never was passed by the Senate, by a majority of all its members, nor by a yea and nay vote."

It is difficult to escape the logic of this opinion. To like effect see *Cohn* v. *Kingsley,* 5 Idaho, 416 (49 Pac. 985, 38 L. R. A. 74); *Stephens* v. *Labette Co.,* 79 Kan. 153 (98 Pac. 790, and note to 16 Ann. Cas. 974). But our view of the effect of Article IV, Sections 1

and 25, renders a discussion of the above question largely academic, and we do not feel that it is necessary to pass upon it in this case.

It is urged that it has been the frequent practice of the legislature ever since the adoption of the Constitution to concur in amendments without the yeas and nays being called and by less than a majority vote of the whole membership. The most that can be said is that the journals are silent as to these particulars. It may be conceded for the purposes of this case, illogical as the concession may seem, that the taking of an aye and nay vote upon an amendment is unnecessary, and that the final passage of a bill in the meaning of the Constitution is the vote by which it passed before it is amended by the other branch of the legislative body; but there still remains Section 25 requiring, in effect, a majority of all the members elected to pass a bill, which in that section evidently means a complete bill ready for the signatures of the respective officers. We do not after a diligent search of the journals find a single instance outside of the present where it is shown that an amendment by one branch of the legislature was concurred in by less than a constitutional majority of the other.

3, 4. We find a multitude of instances where the record is silent on the subject, and in such cases the courts will presume that the constitutional requirement was observed: *State* v. *Rogers,* 22 Or. 348 (30 Pac. 74); *McKinnon* v. *Cotner,* 30 Or. 588 (49 Pac. 956); *Portland* v. *Yick,* 44 Or. 439 (75 Pac. 706, 102 Am. St. Rep. 633). Here the record is not silent. It shows upon its face that only twenty-eight members of the sixty elected voted in favor of the measure. Until some system of logic can be invented which will demonstrate that to pass a bill it is necessary only to pass a part of one, and

that twenty-eight and thirty-one are synonymous, we cannot hold that this measure ever passed the legislature. Counsel for plaintiff has refrained from a discussion of the constitutionality of the act, and we do not place our decision upon that ground. We merely hold that it never passed the legislature, and was, therefore, ineligible to a place on the ballot. The Constitution provides two methods by which measures may be referred to the people for their decision. One is by petition signed by 5 per cent of the legal voters, and the other is by an act passed by the constitutional vote of the legislature. In *State ex rel.* v. *Olcott,* 62 Or. 277 (125 Pac. 303), we held that the courts had jurisdiction to ascertain whether a referendum petition contained a sufficient percentage of names of legal voters to entitle the measure to be put upon the ballot; and following the same line of reasoning we have the right to ascertain whether such constitutional prerequisites have been complied with as will entitle the measure here involved to be voted upon at the June election. They have not. The act never passed the legislature, and a decree will be entered here reversing the decree of the Circuit Court and enjoining the defendant from placing the proposed measure upon the ballot.

REVERSED AND DECREE RENDERED.

MR. JUSTICE BENSON absent.

Argued February 21, affirmed April 3, rehearing denied June 12, 1917.

CORVALLIS & ALSEA RIVER R. CO. *v.* PORTLAND E. & E. RY. CO.

(163 Pac. 1173.)

Railroads—Sale—Assignment of Contract.

1. Where a railroad company which had made a contract with a lumber company to construct an extension of a spur to a certain point to enable the lumber company to transport its logs, before the time for the completion of such extension, sold and conveyed to another railroad company its railroad with all other property real and personal, contracts, rights, etc., and the purchaser accepted the conveyance and commenced the construction of the extension, that conveyance, when construed in the light of the situation of the parties which prevented the vendor from performing the contract and conferred the benefits thereof on the purchaser, assigned the contract for the extension to the purchaser, and imposed on it the obligation to perform it.

Evidence — Parol Evidence — Construction of Deed — Situation of Parties.

2. To construe a deed, the court should be put in the position of the parties, and if the deed is ambiguous, it may be shown by parol how the parties understood it, and dealt with the subject thereof.

[As to parol evidence to explain words used in writing, see note in 122 **Am. St. Rep.** 546.]

Contracts—Construction—Intention of Parties—Entire Instruments.

3. In construing contracts the object is to arrive at the intention of the parties as expressed in the entire instrument.

Assignments—Contracts—Personal Relation—Consent of Other Party.

4. A contract by a railroad to construct a spur for the use of a lumber company is one which necessarily must be performed by a large number of men, and in which, therefore, there is no element of personal relationship, so that the contract may be assigned to a purchaser of the railroad either with or without the consent of the lumber company.

Assignments—Rights of Parties—Assignment.

5. A contract is generally assignable unless assignment is forbidden by public policy or by the contract itself, or unless its provisions show that one of the parties reposed a personal confidence in the other which he would not have been willing to repose in another person.

Railroads—Sale—Liability of Purchaser—Assigned Contract.

6. Where a railroad company assigned to a purchaser of its road a contract for the construction of a spur for a lumber company, which the purchaser was bound to perform, the assignor can recover from the purchaser the damages it has sustained by the latter's failure to perform the contract.

Assignments—Liability of Assignee.

7. The assignment of a contract operates not merely as an assignment of the moneys thereafter to be earned, but of the whole contract with its obligations and burdens.

Assignments—Liability of Assignor.

8. The assignment of a contract does not discharge the assignor from his original undertaking.

Judgment—Conclusiveness—Assignor and Assignee.

9. A judgment for breach of a contract to construct a railroad spur which contract had been assigned to the purchaser of the railroad is conclusive against the purchaser as to the validity of the contract, its breach, and the damages suffered by the other party.

From Multnomah: CALVIN U. GANTENBEIN, Judge.

Action by the Corvallis & Alsea River Railroad Company against the Portland, Eugene & Eastern Railway Company. Judgment for the plaintiff, and defendant appeals. Affirmed.

In Banc. Statement by MR. JUSTICE BEAN.

This is an action brought by the plaintiff against the defendant to recover damages for the breach of a contract. The cause was tried to the court and jury and a verdict rendered in favor of plaintiff for $19,809, and $500 attorney's fees. From a resulting judgment defendant appeals.

Plaintiff alleges in effect that on April 17, 1911, and for some time prior thereto, it owned and operated a railroad line from Corvallis to Monroe and also owned certain railway equipment, rolling stock, real and personal property, rights of way, contracts and franchises; that among the contracts was one made during the year 1909 between the plaintiff and the Corvallis Lumber Manufacturing Company, hereafter to be designated as the Lumber Company, by the terms of which plaintiff agreed to construct a branch line from its main track on or before May 15, 1910, extending into section 16, and also to extend that spur to a point

within the boundary lines of the northwest quarter of section 20 on or before June 1, 1911, the Lumber Company to furnish logs from said timber for transportation to Corvallis over the branch line when constructed; that about March 1, 1911, by agreement between the plaintiff and the Lumber Company, the time for the construction of the branch line was extended until March 1, 1912; and that the plaintiff constructed the first portion of this line but never completed the remainder.

Plaintiff further avers that prior to April 17, 1911, it had entered into negotiations with the defendant company for the sale to the latter of its railway lines, equipment, etc., during which transactions plaintiff particularly called attention to its contract with the Lumber Company and to the modification thereof; that on April 17, 1911, a contract was entered into between the plaintiff and defendant whereby the former agreed to sell and the latter to purchase all plaintiff's railway lines, equipment, rolling stock, rights of way, contracts and franchises; that thereafter in June, 1911, plaintiff conveyed its said properties to defendant and the latter accepted the same and entered into possession thereof.

Plaintiff also asserts that it was the intention of the parties in making the conveyance of the railway property that the contract with the Lumber Company as modified should be transferred to the defendant and that the latter should have the benefit of it and assume the obligations incident thereto; but that the defendant refused to perform the contract with the Lumber Company or to construct the branch line. Plaintiff claims that the Lumber Company at the time knew of the negotiations looking to the sale to the defendant of plaintiff's entire railway property and that it (the Lumber Company) was at all times willing for the

defendant to purchase plaintiff's contract with it, carry out the terms thereof, and build the branch line, but that it never released the plaintiff from its obligation to build that line; that by reason of the defendant's failure to comply with this contract and construct a branch line the Lumber Company instituted an action against the plaintiff in the Circuit Court of the State of Oregon for Benton County; and that such proceedings were had therein that a judgment was rendered against the plaintiff and in favor of the Lumber Company for the sum of $18,000, with interest at 6 per cent from the date of release (December 1, 1913) and costs and disbursements in the amount of $124. In the trial of this action it was also stipulated that $500 was a reasonable expenditure on the part of plaintiff in defending the case brought against it by the Lumber Company. By its answer the defendant admitted its corporate identity but denied all the remainder of the matters alleged in the complaint. Afterwards, at the trial of the cause defendant amended its answer by setting forth separately and affirmatively that on July 20, 1911, the plaintiff executed and delivered to it a certain warranty deed conveying to it, among other things, the then constructed portion of the railroad leading towards the Lumber Company's timber; that the deed contained other covenants of warranty whereby plaintiff covenanted that it would "warrant and forever defend the said granted premises and every part and parcel thereof against all claims and demands of any person or persons whomsoever"; that by reason of these covenants of warranty plaintiff was estopped from alleging, asserting, proving or making any recovery upon the contract alleged in the complaint to have been in existence between the plaintiff and the Lumber Company.

The record discloses substantially the following facts: During the year 1909 the Lumber Company which was then erecting a sawmill at Corvallis purchased a large amount of standing timber in sections 16 and 20, for the purpose of supplying its mill with sawlogs. Previous to such purchase there was a verbal agreement between it and the plaintiff to the effect that if it would purchase the timber and ship the logs therefrom over plaintiff's railroad, the latter would construct the necessary branch line to reach the timber, there being no other means of transporting it. Before the Lumber Company completed such purchase it insisted on a writing from plaintiff embodying the verbal agreement binding the latter to construct the branch line. Such an instrument was executed by the plaintiff on November 4, 1909. It is in the form of a bond executed under seal and binds the plaintiff to build a branch line into section 16 on or before May 15, 1910, and to a point within the boundary lines of the northwest quarter of section 20 on or before June 1, 1911, and to have the same in condition for the transportation of logs from each parcel of land within the time specified. The bond recited in effect that the condition of the obligation was that the Lumber Company was at present engaged in constructing and equipping a sawmill at the City of Corvallis and contemplated the purchase of certain timber lands in Benton County in sections 16 and 20 and that it desired plaintiff to construct a railroad or branch or spur line of railroad to its sawmill at Corvallis. It further recited, in substance, that plaintiff had before October 1, 1909, agreed with the Lumber Company that if it would purchase said timber it would construct this line of railroad into sections 16 and 20 along a certain route described in the bond and would construct and extend

the line as therein indicated. After the execution and delivery of this bond to the Lumber Company it purchased the timber on sections 16 and 20, and in performance of its part of the contract the plaintiff built the branch line into section 16 and the Lumber Company cut a large part of the timber therefrom and shipped the same to Corvallis over plaintiff's railroad. The bond was introduced in evidence. The agreement to extend the time for the building of the branch line into section 20 is as follows:

"This memoranda agreement between Corvallis Lumber Manufacturing Company, and Corvallis & Alsea River Railroad Company, Witnesseth:

"Whereas, heretofore and on or about October 1, 1909, Stephen Carver, the general manager of the above railroad company, entered into an agreement with the above named Manufacturing Company that the said railroad company would construct its line of railroad or branch or spur lines thereof across certain property purchased by the said Manufacturing Company from one J. L. Hartman and wife, and that they would extend the said line through the center of Section 16 of said property on or before May 15, 1910, and a further extension to a point within the boundary lines of the northwest quarter of said Section 20 on or before June 1st, 1911; and

"Whereas, said Manufacturing Company is not in the immediate need of said second extension, and will not need the same prior to March 1, 1912,

"Now, therefore, in consideration of the premises, the said Manufacturing Company does hereby extend the period for the second extension from June 1, 1911, to March 1, 1912.

"Provided, however, that all other conditions, covenants and agreements mentioned in said original contract, to which this extension is to become attached and made a part thereof, shall remain in full force and effect, unaltered and unmodified, save and except that

the time within which the second extension of the spur shall be completed shall be March 1, 1912, in lieu of June 1, 1911.

"In witness whereof, the parties hereto have hereunto set their hands and seals this 1st day of March, 1911."

The bond and agreement of modification thereof, exhibits "C" and "D" herein, were introduced in evidence in the Circuit Court in the Benton County Case.

After negotiations had been pending for some time, on April 17, 1911, the plaintiff and defendant entered into a contract for the sale of the former's railroad, about thirty-one miles in length, with two branches known as the Glenbrook and the Bellfontaine, together with the rolling stock, equipment, machinery, tools and supplies and "all other property, real and personal, *contracts,* rights, assets, and franchises of whatever description and wherever situated * * except its franchise to be a corporation."

The consideration was $410,000, $25,000 of which was to be paid in cash and the balance in deferred payments evidenced by notes of certain denominations to be secured by mortgage bonds pledged therefor as security which were to be placed in the hands of a trustee for that purpose. The contract provided for an issue of bonds by the purchaser in the principal sum of not less than $880,000 and not more than $1,200,000. It also provided that:

"Provision shall be made so that bonds may be issued for extensions, additions, betterments or improvements to such amount for each additional mile of single track railroad as the purchaser may elect, but not exceeding $25,000 for each such mile."

It was stipulated therein that the Corvallis & Alsea River Railroad Company should pay all claims against

the road up to the date of the contract, April 17, 1911. On July 20, 1911, a deed was executed by plaintiff conveying to defendant the property described in the contract. There were several details pertaining to the right of way, etc., which were not completed on the part of the plaintiff until about October of that year. About October 17th a copy of the bond with the Lumber Company was delivered to defendant. When the sale was made, according to the agreement with the Lumber Company there remained to be constructed an extension of about three fourths of a mile in a direct line, but on account of the contour of the land a construction of twice that distance or more was necessitated to reach the timber in section 20. Plaintiff asserts that the defendant accepted the contract to construct the extension and assumed and agreed to perform it. It appears that the Portland, Eugene & Eastern Railway Company, the defendant, did commence the performance of the contract by assembling men and materials on the right of way, making surveys, erecting bunk-houses, and doing some work clearing the right of way. It also constructed or changed a siding and hauled some of the timber for the Lumber Company from section 16. Thereafter it abandoned the work and refused to construct the line into section 20. During the negotiations for the sale of the road the officer of the plaintiff showed Mr. O'Connor, who was representing the defendant in the transactions, where the railroad extension was to be built and where they expected to build it to carry out the contract with the Lumber Company. The latter company was unsuccessful in attempting to get the defendant to complete the line and brought an action against the plaintiff in the Circuit Court of Benton County for damages for failure to construct the line into section 20, claim-

ing that while it was willing for the defendant to build the line it had never released plaintiff from its contract to build the same. Immediately upon being sued plaintiff gave defendant notice to defend, and informed and advised it:

"That in the event the Corvallis & Alsea River Railway Company suffers any damage by virtue of this suit we shall hold the Portland, Eugene & Eastern Railway Company responsible."

The notice was ignored by the defendant. Plaintiff engaged reputable counsel and defended the suit in good faith to the best of its ability with the result that the Lumber Company recovered a judgment against it for $18,124 for failure to build the branch line into section 20. Plaintiff paid the judgment and thereafter instituted this action. The record of the judgment in the Benton County Case was introduced in evidence.

AFFIRMED. REHEARING DENIED.

For appellant there was a brief over the names of *Mr. Ralph E. Moody, Mr. William D. Fenton, Mr. John F. Reilly* and *Mr. Paul P. Farrens,* with an oral argument by *Mr. Moody.*

For respondent there was a brief over the names of *Mr. John M. Pipes, Mr. Martin L. Pipes* and *Mr. A. C. Woodcock,* with oral arguments by *Messrs. John M. & Martin L. Pipes.*

MR. JUSTICE BEAN delivered the opinion of the court.

At appropriate times counsel for defendant raised the questions involved in this case in several different ways, to wit: By a demurrer to the sufficiency of the complaint; by an objection to the introduction of any evidence on account of the insufficiency of the complaint;

by a motion for a nonsuit; by a motion for a directed verdict in favor of defendant; and also by exceptions to instructions given by the trial court to the jury.

The basis of the contention of counsel for defendant that the plaintiff cannot recover in this action is plainly stated in their brief as follows:

"In order to obligate the assignee to carry out the covenants of the assignor, there must be a special agreement to that effect, there must be a novation requiring a mutual agreement whereby the assignee was accepted by the original contractor or vendor and the contractor released from obligation."

Defendant contends that the contract to build the extension was not assignable so as to obligate it to construct the same.

1. Taking the contract of sale and the deed in their entirely this much is plain, that the extension of the railroad into section 20 was agreed to be built by a certain date. The question is: Who should do this? Somebody must or suffer the consequences. The road was sold and conveyed by the Corvallis & Alsea River Railroad Company to the Portland, Eugene & Eastern Railway Company. Under the contract of sale and the deed of conveyance it is clear that the grantor would have no right to exercise any authority in the matter nor to interfere with the right of way, nor obtain any benefit therefrom. Keeping in mind the restriction in the contract for the sale as to the issuance of bonds for the extensions and betterments it would appear that the Portland, Eugene & Eastern Railway Company not only obtained the right, but assumed the responsibility to construct such an extension of the spur. It stipulated in order to preserve the security of plaintiff not to issue bonds for any such extension in excess of $25,000 per mile.

2. It was the defendant's argument in the lower court that no greater obligation nor any less can be imposed upon the purchaser of the road than the writing itself contains. In order to construe the writings the court should be put in the position of the parties. Where a deed is ambiguous it may be shown by parol how the parties understood it and dealt with the substance thereof, in aid of its interpretation: *Harlow* v. *Oregonian Pub. Co.*, 45 Or. 520 (78 Pac. 737). Looking at the written memoranda alone, should the vendor stand sponsor for the future conduct of operations and construct or pay for not constructing an extension agreed to be built before the sale, without any recourse to the vendee, and thus reduce the compensation to be paid for the road? We think not. Does the contract in question stand upon any different foundation than uncompleted outstanding contracts for light, water and fuel to be furnished along the line and paid for, which we will suppose were in existence at the time of the sale? It seems to us that it does not. When the defendant bought and took an assignment of the contract which had been made between plaintiff and the Lumber Company for the construction of the extension of the branch spur and thereby acquired the right to receive the benefits thereof by obtaining materials for transportation, and the privilege of constructing its railroad over the lands of the Lumber Company and increasing its line, and accepted and partially performed the stipulation, it assumed the liability of bearing the burden of the contract, together with the acquisition of the right of appropriating the benefits. It took the contract *cum onere: Union Pac. R. Co.* v. *Douglas Co. Bank,* 42 Neb. 469 (60 N. W. 886); *Smith* v. *Rogers,* 14 Ind. 224.

In a sale of a railroad it would be an utter impossibility to have all collateral contracts and transactions completed *in toto;* and it was meet and proper for the contracting parties, as they did in this instance, to stipulate that the vendor should liquidate all indebtedness incurred up to the time of the conveyance, and make provision for funds for future operations. Such a stipulation precludes the idea that the seller would be ultimately bound to bear the expenses of the construction of an extension or the making of betterments or running expenses after that time. All such later responsibilities were certainly at least impliedly assumed by the Portland, Eugene & Eastern, the vendee, by the contract of purchase which it executed and the deed which it accepted.

3. In construing contracts it is a recognized principle that the object of all rules of interpretation is to arrive at the intention of the parties as expressed in their contract, and that in written contracts which permit of construction, this intent is to be derived from an examination of the entire instruments.

"The problem is not what the separate parts mean, but what the contract means when considered as a whole": 2 Page on Contracts, § 1112.

It was said by Mr. Justice WOODS in *Merriam* v. *United States,* 107 U. S. 441 (27 L. Ed. 533, 2 Sup. Ct. Rep. 540):

"It is a fundamental rule that, in the construction of contracts, the courts may look not only to the language employed, but to the subject matter and surrounding circumstances, and may avail themselves of the same right which the parties possessed when the contract was made."

In Beach on Modern Law of Contracts, vol. 1, § 702, the author says:

"To ascertain the intention, regard must be had to the nature of the instrument itself, the condition of the parties executing it, and the objects which they had in view. The words employed, if capable of more than one meaning, are to be given that meaning which it is apparent the parties intended them to have."

The contract for the extension was sold and assigned by inserting the word "contracts" in the agreement of sale and with like brevity in the deed of conveyance. We think, however, that the construction contract with the Lumber Company came within the descriptive terms of the sale contract and the deed and was assigned to the Portland, Eugene & Eastern Railway Company, the vendee (*Sommer* v. *Island Mercantile Co.*, 24 Or. 216 (33 Pac. 559); *Reinstein* v. *Roberts*, 34 Or. 92 (55 Pac. 90, 75 Am. St. Rep. 564); *La Vie* v. *Tooze*, 43 Or. 595 (74 Pac. 210), and that the rights and duties of the parties in carrying out the same are fairly shown by their agreement when considered in the light of the attending facts and circumstances: *Atl. & N. C. R. Co.* v. *Atl. & N. C. Co.*, 147 N. C. 368 (61 S. E. 185, 125 Am. St. Rep. 550, 15 Ann. Cas. 363, 23 L. R. A. (N. S.) 228); *Himrod Furnace Co.* v. *The C. & M. R. Co.*, 22 Ohio St. 451; *American Bond. & Trust Co.* v. *Baltimore & O. S. W. R. Co.*, 124 Fed. 866, 875 (60 C. C. A. 52).

4. In the present case the contract involves no peculiar or special skill or personal element so far as the Lumber Company is concerned. A temporary road sufficient to transport the timber would fulfill the requirements of the contract. It appears that the Lumber Company assented to the agreement. We think the contract between the plaintiff and the Lumber Company was assignable.

The general rule is that an executory contract which is not necessarily personal in its character and which

can consistently with the rights and interests of the adverse party be sufficiently executed by the assignee is assignable, where there is an absence of an agreement in the contract in regard to the assignability: *N. Y. Bank Note Co.* v. *Hamilton Bank Note Co.*, 180 N. Y. 280, 291 (73 N. E. 48); *Smith* v. *Craig*, 211 N. Y. 456, 461; *Quinn* v. *Whitney*, 204 N. Y. 363, 369 (97 N. E. 724); *Himrod Furnace Co.* v. *C. & M. R. Co.*, 22 Ohio St. 451; *Frese* v. *Moore*, 1 Cal. App. 587 (82 Pac. 542). In its very nature the contract in question was one which would have to be performed by many men. It is for that reason assignable as declared by this court in *Browne & Co.* v. *John P. Sharkey Co.*, 58 Or. 480, at page 483 (115 Pac. 156, at page 157), wherein Mr. Justice MCBRIDE said:

"The case of *Campbell* v. *Sumner County*, 64 Kan. 376 (67 Pac. 866), cited by appellant, wherein it is held that a contract to do county printing is one made in contemplation of the special skill of the contractor, does not meet with our approval. Contracts to print books, with or without illustrations, are such as must in their very nature be performed by many hands, and, unless there is something in the circumstances to indicate the contrary the general rule should be that the contract is for a certain quality of work, and not that a particular person shall perform it. The case of *Carter* v. *State*, 8 S. D. 153 (65 N. W. 422), holds exactly the reverse of the Kansas case above cited, and we think with better reason."

In *Devlin* v. *Mayor*, 63 N. Y. 8, we find at page 17, the following:

"The assignability of a contract must depend upon the nature of the contract and the character of the obligations assumed rather than the supposed intent of the parties, except as that intent is expressed in the agreement."

In the case at bar the original contract was made between two different corporations. It necessarily follows that the work was to be done through agents and servants and there could be no personal element involved. The Lumber Company was perfectly willing that the branch line of railroad should be constructed by plaintiff or any contractor or assignee with whom plaintiff might deal to that end. In 2 R. C. L., pp. 601, 602, it is stated:

"As a general rule it may be stated that building and construction contracts, which of necessity usually require the labor and attention of a number of men, are assignable, unless it appears that the contract was made because of the knowledge, experience or pecuniary ability of the contractor, or that for some reason he was especially fitted to carry it out, or that it involved some feature of a personal nature."

In 21 L. R. A. (N. S.), 359, note, we find the following:

"As applied to building and construction contracts, which of necessity usually require the labor and attention of a number of men, it is generally held that such contracts do not come within the foregoing rule (involving personal relation) and are therefore assignable, unless it appears that the contract was made because of the knowledge, experience, etc., of the contractor."

5. The usual test laid down in the cases is that a contract is generally assignable unless forbidden by public policy, or by the contract itself, or when its provisions are such as to show that one of the parties reposed a personal confidence in the other which he would not have been willing to repose in any other person. It is not pleaded in the present case that the Lumber Company would not have confided to any other company the duty of building the branch line. The work

to be done by both parties was common ordinary work necessarily to be performed by many men. In *New England Iron Co.* v. *Gilbert Elevated R. Co.,* 91 N. Y. 166, the following appears in the opinion:

"The matter of the contract involved no personal relation or confidence between the parties, or exercise of personal skill or science, for the contractor was a corporation and its work was necessarily to be done through agents or servants. There are no words restraining its assignment, and the mere fact that the persons representing the contractor are assignees, and not merely agents or servants, will not operate as a rescission of or constitute a cause for terminating the contract."

6. As between the Portland, Eugene & Eastern Ry. Company, the assignee, and the Corvallis & Alsea River Railroad Company, the assignor, the former is bound to carry out the provisions of the assigned contract and in all respects to comply with the terms of the assignment, as signified by the contract of sale and deed of conveyance of the road. The latter may recover from the defendant the damages it has sustained by reason of the failure of the assignee to carry out the assigned contract: 5 C. J., p. 976, § 168; 4 Cyc. 82 (B); *Atl. & N. C. R. Co.* v. *Atl. & N. C. Co.,* 147 N. C. 368 (61 S. E. 185, 125 Am. St. Rep. 550, 15 Ann. Cas. 363, 23 L. R. A. (N. S.) 228); *Cutting Packing Co.* v. *Packers' Exchange,* 86 Cal. 574 (25 Pac. 52, 21 Am. St. Rep. 63, 10 L. R. A. 369); *Younce* v. *Lumber Co.,* 148 N. C. 34, 36 (61 S. E. 624); *Bach* v. *Boston etc. Consol. Min. Co.,* 16 Mont. 467 (41 Pac. 75); *State* v. *School Dist.,* 51 Neb. 237 (71 N. W. 727); *Union Pacific R. Co.* v. *Douglas County Bank,* 42 Neb. 469 (60 N. W. 886).

7. It may be stated generally that the assignment of a contract operates not merely as an assignment of the moneys thereafter to be earned, but of the whole con-

tract with its obligations and burdens. After the same has been modified by the parties thereto it is an assignment of the contract as modified: 5 C. J., p. 947, § 122.

In *Atl. & N. C. R. Co.* v. *Atl. & N. C. Co.*, 147 N. C. 368 (61 S. E. 185, 125 Am. St. Rep. 550, 15 Ann. Cas. 363, 23 L. R. A. (N. S.) 228), one Ives who had an oral contract with the plaintiff company to deliver cordwood recovered judgment against it for violation of the agreement. The company paid the judgment and then sued the defendant on the ground that the Ives contract was assigned to the defendant to whom the plaintiff had leased its railroad and that the defendant owed plaintiff the duty of carrying out the assigned contract. Plaintiff recovered. Mr. Justice HOKE at page 231 of the opinion said:

"For while, as heretofore stated, the lessor company was not relieved of the obligation under this contract unless Ives had agreed to accept the lessee in discharge of the former, as between these parties, the lessor and lessee, the force and effect of the assignment were to establish, in any event, a primary liability in the lessee, and, under the general equitable principles of *indebitatus* assumpsit, the lessor having been forced to pay, can recover of the lessee the amount of this enforced recovery. Keener Quasi Contr., p. 396, 15 A. & E. Ency. Law, 1108. In the citation from Keener, *supra*, it is said: 'It may be stated as a general proposition that a plaintiff can recover against a defendant as for money paid to his use to the extent that the claim paid by the plaintiff should have been paid by the defendant.' * * (After quoting from the case of *Cutting Packing Co.* v. *Packers' Exchange*, *supra*, it was said): While this ruling was made to depend to some extent on a section of the California Code, the statute itself is only an embodiment of the generally accepted doctrine applicable to the facts indicated."

In *Cutting Packing Co.* v. *Packers' Exchange,* 86 Cal. 574 (25 Pac. 52, 21 Am. St. Rep. 63, 10 L. R. A. 369), the plaintiff made a contract to purchase and one Blackwood to sell crops of apricots for certain years, stating the minimum and maximum amounts. The agreement was assigned by plaintiff to defendant, but Blackwood refused to accept the defendant in place of the plaintiff. It was performed for two years. During the third year the defendant refused to accept the apricots and the plaintiff received them, sold them upon the market for a less price than that stipulated by the contract, and thereupon brought action against the defendant for the deficiency by reason of the breach of the agreement. Mr. Justice WORKS, speaking for the court, said:

"The obligation thus assumed was apparent on the face of the contract. We therefore think it plain that as the plaintiff, as assignor, was still bound to Blackwood to pay the price stipulated in the contract, notwithstanding the assignment, and as the defendant, as assignee, assumed such obligation, the plaintiff, as between it and the defendant, stood in the nature of a surety for the latter for the performance of the obligation. If this be correct, it then follows, that from the assignment, an implied contract arose between the plaintiff and defendant, whereby the latter became bound to the former to receive and pay for the apricots according to the terms of the original contract."

8. The assignment of a contract does not discharge the assignor from his original undertaking: *Atl. & N. C. R. Co.* v. *Atl. & N. C. Co.,* 147 N. C. 368 (61 S. E. 185, 125 Am. St. Rep. 550, 15 Ann. Cas. 363, 23 L. R. A. (N. S.) 228); *Cutting Packing Co.* v. *Packers' Exchange,* 86 Cal. 574 (25 Pac. 52, 21 Am. St. Rep. 63, 10 L. R. A. (N. S.) 369); *R. L. Co.* v. *S. & P. P. Co.,* 135

N. Y. 216, 217 (31 N. E. 1018); 4 Cyc. 84, par. 3; *Martin* v. *Orndorff*, 22 Iowa, 504.

9. The Portland, Eugene & Eastern Railway Company, having been notified to defend the action brought against the Corvallis & Alsea River R. Company, in the Circuit Court for Benton County, if ultimately liable is bound by the judgment in that case to the same extent as though it had been a party to the record. Such judgment is conclusive upon the defendant of the following issues in the present case: (1) That there was a valid contract between the plaintiff and the Lumber Company whereby plaintiff was bound to construct the branch line of railroad into section 20; (2) that the contract was violated; (3) that by reason of the violation of the contract the Lumber Company was damaged in the sum of $18,124: *Astoria* v. *Astoria & Columbia Riv. Ry. Co.*, 67 Or. 549, 550 (136 Pac. 645, 49 L. R. A. (N. S.) 404); *Oceanic Steam Nav. Co.* v. *Campania Transatlantic Espanola*, 144 N. Y. 663 (39 N. E. 360); *Washington Gaslight Co.* v. *Dist. of Columbia*, 161 U. S. 316 (40 L. Ed. 712, 16 Sup. Ct. Rep. 564); *Town of Waterbury* v. *Waterbury Terminal Co.*, 74 Conn. 152 (50 Atl. 3, 40 L. R. A. (N. S.) 1174, note); 23 Cyc. 1270. It was proper for the court to instruct the jury, if it found for plaintiff, to find a verdict for $18,124, and interest thereon at 6 per cent, as the Benton County judgment against defendant conclusively established that amount as the damage suffered by the Lumber Company, and it was clearly proved and not controverted, that plaintiff paid such sum: *Crossen* v. *Grandy*, 42 Or. 286, 287 (70 Pac. 906).

This leaves the main question of the liability of the defendant for the performance of the contract for the extension of the branch line to be tried and considered.

There was no error in the refusal of the trial court to hold that the defendant was not liable nor in the denial of the several motions. It was the duty of the trial court to construe the writing, which it did, but submitted to the jury the question of the identification of the contract and the intent of the parties as to the assignment and advised them that if they found that it was not the intention of the vendor and vendee that the contract in question should be assigned they should find for the defendant.

It appears that the trial court, after construing the writings to the effect as above indicated, over the objection and exception of defendant instructed the jury as follows:

"The alleged contract between the plaintiff and the Corvallis Lumber Manufacturing Company was an assignable contract, with or without the consent of the Lumber Company, and if you find from the evidence that the said contract, if you find there was such a contract, was assigned to the defendant, then the defendant was bound to the plaintiff to perform the contract."

The charge of the court was in strict accord with the law as shown by the authorities above referred to. The defendant requested the court to charge the jury in accordance with the law as contended for by defendant raising practically the same questions as the motions above adverted to. This request does not require a separate discussion. We find no error in the record. It follows that the judgment of the lower court should be affirmed and it is so ordered.

AFFIRMED. REHEARING DENIED.

MR. JUSTICE HARRIS took no part in the consideration of this case.

MR. JUSTICE MCCAMANT delivered the following dissenting opinion:

I am unable to concur in so much of the foregoing opinion as approves the following instruction given by the court below, and to which the defendant excepted:

"The alleged contract between the plaintiff and the Corvallis Lumber Manufacturing Company was an assignable contract, with or without the consent of the Lumber Company, and if you find from the evidence that the said contract, if you find there was such a contract, was assigned to the defendant, then the defendant was bound to the plaintiff to perform the contract."

The assignee of a contract is undoubtedly liable on its covenants if he expressly assumes them. In two of the cases cited in the majority opinion the liability of the assignee was predicated on such assumption: *Younce* v. *Lumber Co.*, 148 N. C. 34, 36 (61 S. E. 624); *Bach* v. *Boston Co.*, 16 Mont. 467 (41 Pac. 75). It is also well settled that in case the assignee claims the fruits of the contract, he will be held to have assumed its burdens. The case of *Atlantic Co.* v. *Atlantic Co.*, 147 N. C. 368 (61 S. E. 185, 125 Am. St. Rep. 550, 15 Ann. Cas. 363, 23 L. R. A. (N. S.) 228), charges the assignee with liability under the contract, on this ground: plaintiff had entered into a continuing contract with one Ives to purchase cordwood cut by Ives for use on plaintiff's locomotives. Plaintiff subsequently leased its railway line to the defendant and the defendant accepted cordwood from Ives for a period of time. Thereafter the defendant substituted coal for wood as fuel on its locomotives and sought to repudiate its obligations under the Ives contract. It was properly held that the defendant by enjoying the fruits of the contract had impliedly assumed its burden.

The case of *State* v. *School District,* 51 Neb. 234 (71 N. W. 727), was the same kind of a case. It involved the assignment of a building contract. The assignee accepted the assignment and completed the building. The court held that while he was entitled to the emoluments of the contract he was also chargeable with its burdens. *Union Pacific Co.* v. *Douglas Bank,* 42 Neb. 469 (60 N. W. 886), is to the same effect. A contract for the performance of work had been assigned by Mrs. Wells to Clarkson. Clarkson claimed the benefits of the contract and was held bound by its burdens. We quote from the opinion on pages 478 and 479 (on pages 888, 889, of 60 N. W.) of the report:

"We do not mean that the intention of the parties was by the assignment *eo instante* to impose upon Clarkson Mrs. Wells' obligations."

"We do not here determine that by the assignment he *ipso facto* rendered himself liable personally for the wages of the employee. What we do hold is that under such an assignment he cannot be permitted in equity to avail himself of the benefits of the contract without discharging its obligations."

The remaining case cited in the majority opinion is *Cutting Co.* v. *Packers' Exchange,* 86 Cal. 574 (25 Pac. 52, 21 Am. St. Rep. 63, 10 L. R. A. 369). The facts as reported in this case are meager but if the case can be interpreted as holding that the mere acceptance of the assignment of a contract charges the assignee with the obligations of the assignor thereunder the case is out of harmony with the weight of authority and should not be followed. The law is stated in 2 R. C. L., pages 625, 626, as follows:

"A question has been raised as to whether the assignment of a contract operates to cast on the assignee liabilities imposed by the contract on the assignor, and

it may be stated as a general principle that the assignment does not have any such effect."

In *New York Phonograph Co.* v. *Davega,* 127 App. Div. 222, 234, 111 N. Y. Supp. 363, the court says:

"There are many decisions to the effect, and none that my research has disclosed to the contrary, that in the absence of express agreement the assignee of a personal contract is not liable on the covenants of his assignor."

In *Anderson* v. *New York Co.,* 132 App. Div. 183, 188, 116 N. Y. Supp. 954, the court says:

"The assignment was, doubtless, made and accepted with knowledge of all the provisions of the contract assigned, but something more than that was necessary to obligate the assignee to carry out the covenants of the vendee named in the contract. This could only be done by a specific agreement to that effect."

To the same effect see: 2 Elliott on Contracts, § 1456; *Suydam* v. *Denton,* 84 Hun, 506, 508 (32 N. Y. Supp. 333); *Heinze* v. *Buckingham,* 17 N. Y. Supp. 12; *Smith* v. *Kellogg,* 46 Vt. 560, 564; *Consolidated Co.* v. *Peers,* 166 Ill. 361, 374 (46 N. E. 1105, 38 L. R. A. 624); *Tolerton Co.* v. *Anglo-Californian Bank,* 112 Iowa, 706 (84 N. W. 930, 50 L. R. A. 777).

It is to be noted that the contract which was assigned to the defendant was only a liability. It is stated in Anson on the Law of Contract, Section 293, that "a promisor cannot assign his liability under a contract." Applying this principle to the facts in this case it is at least to be said that the defendant should not be presumed to have agreed to discharge plaintiff's liability on its contract with the Corvallis Lumber Manufacturing Company without convincing evidence to that effect.

By the instruction above quoted the jury was told that the mere fact of the assignment spelt a liability for the defendant. Under this instruction plaintiff was not required to prove that the defendant had assumed the obligations of the contract or even accepted the assignment. In my opinion this was prejudicial error calling for the reversal of the judgment.

MR. JUSTICE BURNETT concurs in the result of the above dissenting opinion.

Argued April 3, reversed and decree rendered April 17, motion for stay of judgment denied June 12, 1917.

DRAGSETH *v.* MASON.

(164 Pac. 376.)

Waters and Watercourses—Enjoining Dam—Sufficiency of Evidence.

1. Substantially uncontradicted evidence that defendant's dam backed water on to plaintiff's land, preventing cultivation of some land, and interfering with pumping pure water to his house, *held* to require an injunction against such an obstruction of the stream.

[As to rights and liabilities of owners of dams, see note in 57 Am. Dec. 684.]

From Hood River: WILLIAM BRADSHAW, Judge.

Suit by Martin Dragseth against A. I. Mason. From a decree denying relief, plaintiff appeals. Reversed and decree rendered.

Department 2. Statement by MR. JUSTICE BEAN.

This is a suit to restrain the defendant from obstructing a stream so as to back water onto plaintiff's land. From a decree denying relief to the latter, he appeals.

Plaintiff Dragseth and defendant Mason are the owners of adjoining tracts of land in Hood River Valley, except that there is a forty-foot county road between their holdings. Defendant's property lies immediately north of that of plaintiff. A stream of water enters Dragseth's premises on the east and flows northwesterly across the county road into and through the lands of the defendant discharging into Hood River. In its natural state this stream was winding but plaintiff straightened the same through his low land, removed logs and brush, and placed about 700 feet of tiling therein to drain the same. About 300 feet south of defendant's land and near this stream plaintiff installed a ram for the purpose of forcing water to his dwelling from a spring owned by him. In order to improve his land in 1911 the defendant erected in the middle of the channel of this stream at the south line of his land a cement basin, octagonal in shape and about 51 inches in height. This was done over plaintiff's protest. This basin is so constructed that the waters of the stream flow into it through an incision on the south side, the north side being solid, and drop to the floor therein. Strings of tile leading from the bottom of the basin conduct the water from thence to the premises of the defendant on the north, there to operate a ram and other contrivances for his personal use. Plaintiff complains that this construction raises the water in the stream, hinders its flow, backs it into his ram pit, and retards the drainage of his low lands adjoining so that they cannot be cultivated to advantage; that these waters flow through chicken-yards, hog-pens and the like before reaching his premises, into which stream there is also discharged above him the sewage from the tanks and toilets of the schoolhouse. REVERSED. DECREE RENDERED.

For appellant there was a brief and an oral argument by *Mr. A. J. Derby.*

For respondent there was a brief and an oral argument by *Mr. George R. Wilbur.*

MR. JUSTICE BEAN delivered the opinion of the court.

1. The question presented is one of fact. Counsel for defendant does not contend that Mason has the right to back the water onto plaintiff's land to his damage as charged in the complaint. It appears from the evidence that Dragseth has owned his tract since 1901. In 1903 he commenced to drain the low land along the stream and arranged his tiling so that the main part or trunk of the system emptied into the creek a short distance south of Mason's line where the stream had not been changed, the lower end of the tiling being above the surface of the water so that it drained the land. In 1911 Mason constructed in the bed of the creek a cement octagonal box six feet across with wing dams reaching across the creek, the back or north side being about 51 inches in height or 40 inches above the floor, and the south side or intake 20 inches from the bottom. This was done in order to turn the water into the tiling connected with the basin, one string of which was higher than the other at this end and carried water to Mason's ram and furnished power for pumping. At that time Mason changed the location of some of his tiling and raised the end towards Dragseth's land. After this obstruction was placed in the bed of the stream water backed up onto Dragseth's premises for about 300 feet to where he had a ram and submerged it. Silt accumulated in the creek so that the end of plaintiff's tiling which before that time was above the surface of the water was about 16 inches below the soil in

the brook and the lower part of his land could not be drained, was very swampy and would not raise crops. Dragseth states that the cement work raised the water in the creek 20 to 24 inches above its natural flow; that in times of high water the highest part of the cement basin serves as a dam and raises the water four or five feet. In the principal part of his statement he is corroborated by his neighbor farmers and road supervisor.

We have looked carefully through the evidence to find any substantial contradiction of plaintiff's claim and find none only in theory. The very competent civil engineer who took levels of the creek, basin, tiling, ram, etc., drew a diagram of the premises, and testified as a witness in the case, for some reason was not requested to place his opinion in the balance. Other than nonexpert witnesses expressed their views. On cross-examination Mr. Mahr, witness for plaintiff, testified thus in regard to the water of this stream:

"Well, apparently; of course, the way it is now, apparently the water is kind of held back in order to strike that one pipe, there, that top pipe."

In order to divert water from its natural channel it is ordinarily necessary to construct a dam in the stream at least part of the way across the same. To turn the water into his tiling Mason did as people usually do, but instead of calling the obstruction a dam, termed a portion thereof a cement basin; nevertheless it served the same purpose as a dam and as the evidence clearly shows obstructs the water so as to throw it back onto Dragseth's land about 300 feet. This is not a great distance, but the result prevents Dragseth from cultivating a small amount of good land and interferes with the successful operation of his ram so as to pump impure creek water to his house instead of pure spring water. Mr. Mason states that there is too much fall

in the creek. We are unable to determine whether he erected the south end of his tile too high by accident or on account of convenience. We find that the cement basin is an obstruction to this stream of water to plaintiff's damage; that all that part of the cement work of the basin above the lower floor thereof should be removed; and that defendant should be enjoined from obstructing the stream to that extent. The decree of the lower court will therefore be reversed and one entered in accordance herewith.

It appears that both parties have made an honest effort to ascertain their rights in the premises and that there has been no willful trespass on the part of the defendant. We believe the ends of justice will be served if each party pays his own costs, therefore neither will be allowed costs. REVERSED. DECREE RENDERED.

MR. JUSTICE MOORE, MR. JUSTICE BENSON and MR. JUSTICE MCCAMANT concur.

Argued March 28, reversed April 24, rehearing denied May 22, motion to retax costs denied June 12, 1917.

GOLDEN ROD MILLING CO. *v.* CONNELL.*

(164 Pac. 588.)

Pleading—Change of Case—Amendment.

1. Where original answer set up defense of violation of bulk sales law (Sections 6069–6072, L. O. L.), the court had no power under Section 102, L. O. L., to allow defendant to file an amended answer after trial, alleging actual fraud in the transfer; that being a material alteration not allowable at such time.

[As to remedies of creditor for violation of the bulk sales law, see note in Ann. Cas. 1916C, 928.

*On remedy of creditors where sale is made in violation of bulk sales law, see notes in 39 **L. R. A. (N. S.)** 374; **L. R. A.** 1916B, 974. REPORTER.

Fraudulent Conveyances—Sales in Bulk—Liability of Buyer—Fixtures—Statute.

2. Tools and machinery in mill purchased by plaintiff in 1911 are not subject to execution to satisfy a subsequent judgment secured by creditor against seller, although no notice was given of the transfer; the bulk sales law (Section 6069, L. O. L., et seq.) before amendment in 1913 (Laws 1913, p. 537) not applying to that class of property.

From Multnomah: WILLIAM GALLOWAY, Judge.

Suit by the Golden Rod Milling Company, a corporation, against Joseph Connell and Tom M. Word, as sheriff of Multnomah County, Oregon. From a judgment in favor of defendants, plaintiff appealed. Reversed and judgment rendered in favor of plaintiff.

Department 1. Statement by MR. JUSTICE BENSON.

This is a suit to restrain proceedings under a writ of execution. The substance of the complaint is that on February 20, 1914, defendant Joseph Connell obtained a judgment against Acme Mills Company, Inc., a corporation, for a total of about $5,800, and on April 15, 1914, the defendant sheriff attempted to levy upon certain tools and machinery in plaintiff's mill and then used by it in the manufacture of cereal breakfast foods; that the sheriff placed a caretaker over such property and left the same in place as installed and operated in plaintiff's mill, but that defendants now threaten to tear out such machinery and appliances and remove the same for sale under said execution. It is then alleged that the claim of defendant Connell is substantially to the effect that the property attempted to be levied upon was formerly a part of the plant and property operated by the Acme Mills Company which sold and transferred it to Acme Mills Company, Inc., some time in the year 1910; that thereafter in 1911, the latter sold the same to plaintiff and that he contends that it is the property of the Acme Mills

Company and the Acme Mills Company, Inc. Then follow allegations of irreparable injury and of absolute ownership and possession in plaintiff for more than three years and a prayer for a perpetual injunction. After some admissions and denials, the defendants set up an affirmative answer wherein they plead the judgment of the defendant Connell against the Acme Mills Company and the Acme Mills Company, Inc., the issuance of the execution; and that the sheriff levied upon the property described in the complaint by taking it into his possession. It is then alleged that the sale of the property levied upon was made in violation of the bulk sales law, by reason of the fact that it was effected without notice to the defendant Connell, who was at the time a creditor of the Acme Mills Company to the extent of the judgment afterward obtained.

On December 18, 1914, the cause was tried and on February 25, 1915, the court made and filed findings of fact and conclusions of law and on the same day defendants filed an amended answer containing a second further and separate answer which alleged actual fraud in the transfer of the property from the Acme Mills Company, Inc., to the plaintiff. On March 25, 1915, a decree was entered in favor of defendants from which plaintiff appeals.

Reversed and Judgment Entered.
Rehearing and Motion to Retax Costs Denied.

For appellant there was a brief over the names of *Messrs. Bauer & Green* and *Mr. A. H. McCurtain,* with an oral argument by *Mr. Thomas G. Green.*

For respondents there was a brief over the name of *Messrs. Sheppard & Brock,* with an oral argument by *Mr. Chester A. Sheppard.*

MR. JUSTICE BENSON delivered the opinion of the court.

1. The sole issue upon which the trial of the cause was based, was the question as to whether or not the sale of the property in question had been made in violation of the statute known as the "bulk sales law." After trial the defendants sought to set up the additional defense of actual fraud in the transfer. This they were not entitled to do and the trial court had no power to permit such amendment; Section 102, L. O. L.; *Foste* v. *Standard Ins. Co.*, 26 Or. 449 (38 Pac. 617); *Carnahan Mfg. Co.* v. *Beebe-Bowles Co.*, 80 Or. 124 (156 Pac. 584).

2. We come then to a consideration of the defendants' right to prevail under the provisions of the bulk sales law. It will be remembered that the sale involved in this controversy occurred in 1911, before the amendment of that statute. The original law, Section 6069, et seq., L. O. L., was amended in 1913 (Laws 1913, p. 537) and it has since been held by this court that property of the character described in the complaint was not affected by the act prior to such amendment: *Rice* v. *West*, 80 Or. 640 (157 Pac. 1105). Consequently, under the issues upon which the cause was tried, the plaintiff was entitled to the relief sought. The decree will therefore be reversed and one entered here in accordance with the prayer of the complaint.

REVERSED AND JUDGMENT ENTERED.
REHEARING AND MOTION TO RETAX COSTS DENIED.

MR. CHIEF JUSTICE MCBRIDE, MR. JUSTICE BURNETT and MR. JUSTICE HARRIS concur.

Argued April 26, affirmed May 1, rehearing denied June 12, 1917.

MISHLER *v.* EDMUNSON.

(164 Pac. 718.)

Exceptions, Bill of—Contents.

1. A literal transcript of all the evidence given on trial, interspersed with remarks and objections of counsel and the statements of the court's rulings, having appended what purports to be the entire charge to the jury, is not a bill of exceptions, and the objections made cannot be considered.

From Lane: JAMES W. HAMILTON, Judge.

This is an action of replevin by A. J. Mishler against J. M. Edmunson, wherein the jury returned a verdict in favor of plaintiff, from which verdict and the judgment rendered thereon, the defendant appeals. Affirmed.

Department 1. Statement by MR. JUSTICE BURNETT.

Claiming to have purchased from the defendant 184 bales of hops at the price of $3,446.90, upon which he had paid the sum of $1,000, the plaintiff tenders in court the balance and brings replevin to recover the property on the refusal of the defendant to deliver the same to him, laying his damages for the detention at $200.

The answer denies the entire complaint and avers in substance that the $1,000 mentioned constituted the consideration for an option to buy the hops at the price named in the complaint, given on October 19, 1914, and ending on the 24th of the same month, by the terms of which the plaintiff was to forfeit all payments made unless he had paid in full for the property by the expiration of the option period, and that inasmuch as he failed in this, the defendant was compelled to and did dispose of the property to other parties on the

assumption that the plaintiff had determined not to exercise the option.

The reply challenged the entire answer. The jury returned a verdict in favor of the plaintiff and in substance assessed the value of the plaintiff's interest in the property at $1,346.69. From the ensuing judgment the defendant appealed.

AFFIRMED. REHEARING DENIED.

For appellant there was a brief over the names of *Messrs. Woodcock, Smith & Bryson* and *Mr. L. R. Edmunson,* with an oral argument by *Mr. A. C. Woodcock.*

For respondent there was a brief over the name of *Messrs. Foster & Hamilton,* with an oral argument by *Mr. R. S. Hamilton.*

MR. JUSTICE BURNETT delivered the opinion of the court.

1. What is relied upon by the defendant as a bill of exceptions is nothing else than a literal transcript of all the evidence given at the trial interspersed with remarks and objections of counsel and the statements of the court's rulings. Appended is what purports to be the entire charge of the court to the jury. The errors assigned in the abstract relate only to an instruction of the court on the subject of what constitutes a sale, mingled with counsel's discussion of the same. We must decline to consider the objections thus framed because we have no bill of exceptions. In *Keady* v. *United Rys. Co.,* 57 Or. 325 (100 Pac. 658, 108 Pac. 197), Mr. Justice SLATER compiled to that date the precedents established by this court on that subject laying down the rule very lucidly that a document

framed as the one before us does not constitute a bill of exceptions and declining to consider the questions suggested. Again, in *National Council* v. *McGinn*, 70 Or. 457 (138 Pac. 493), the subject was discussed and the authorities brought down to that time. The principle has been reiterated several times since, but not often enough to require a supplemental compilation. At present it is unnecessary to add to the necrology of such crude attempts to bring before us objections to the decisions of the Circuit Court. It not being apparent that the substantial rights of the defendant were seriously abused, the judgment will be affirmed for want of a proper record upon which to review the same. AFFIRMED. REHEARING DENIED.

MR. CHIEF JUSTICE MCBRIDE, MR. JUSTICE BENSON and MR. JUSTICE BEAN concur.

Argued May 8, reversed and remanded May 22, rehearing denied June 19, 1917.

MORGAN *v.* JOHNS.*

(165 Pac. 369.)

Appeal and Error—Motion for Nonsuit—Exceptions.

1. Where, at the close of the evidence for the plaintiff, the defendant moved for a judgment of nonsuit, which was denied, any error of the court in such holding cannot be assigned as a reason for reversal, where the bill of exceptions fails to show an exception was taken to the ruling on the motion; it not being error merely, but error legally excepted to, which is assignable.

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*"As to the effect of an unauthorized sale or disposal of pledge by pledgee to dispense with tender, as a condition of trover against pledgee, see the case of *Austin* v. *Vanderbilt*, 48 Or. 206 (85 Pac. 519, 120 **Am. St. Rep.** 800, 10 **Ann. Cas.** 1123, 6 **L. R. A. (N. S.)** 298), and note in the last report."

As to pledgee's conversion of pledged property by invalid sale, see note in 43 **L. R. A.** 737. REPORTER.

Appeal and Error—"Exception"—Matter in Writing and in Record.

2. Under such circumstances, the bill of exceptions, containing the official stenographer's report of the case, narrating that the defendant objected or demurred to the sufficiency of plaintiff's testimony, with reasons therefor, is not a matter "in writing and on file in the court," so as to fulfill the requirements of Section 172, L. O. L., providing no exception need be taken or allowed to any decision upon a matter of law, when the same is entered in the journal, or made wholly upon matters in writing and on file in the court; as, when the ruling of the Circuit Court on the motion for nonsuit is made, its determination is not wholly on written data before it, but depends mainly on the oral testimony which the judge has heard, and the bill of exceptions when made, relates to the matters already past and contains the testimony which has been reduced to writing since the trial.

Appeal and Error—Objection to Ruling—"Exception."

3. An exception is an objection taken by the appealing party at the time the adverse ruling was made.

Trial—Taking Case from Jury—Admissions—Evidence.

4. Where, in an action for conversion, plaintiff alleged sale by defendant of corporate stock held as collateral for a debt due defendant, which transaction defendant pleaded was a sale of stock to a third person, with an option from the vendee to plaintiff to repurchase, on a certain date, at a stipulated price, there was evidence that defendant had stated he held the stock as collateral and that the stock had been pledged to him as collateral, a motion for a nonsuit was properly denied, regardless of other evidence submitted.

Trial—Instructions—Measure of Damages.

5. In such an action, a requested instruction by defendant that, in case the jury find for the plaintiff, they could only find for nominal damages, was properly refused, as excluding from the consideration of the jury the actual reasonable value of the stock.

[As to the fixing of the measure of damages in actions of tort, see note in 91 Am. St. Rep. 729.]

Pledges—Repledges—Effect on Character of Chattels.

6. Plaintiff, defendant and defendant's wife were engaged in a farming venture. Upon a yearly settlement, plaintiff was short $1,282.73 which defendant arranged to advance to him. A holding corporation for the farm was formed, one third of the stock represented by one certificate being issued to each. Plaintiff claimed he turned his share to defendant as collateral to be used in raising money to pay his balance of the indebtedness. Under such circumstances, an instruction to the effect that a pledge is a transfer of personal property, as a security for a debt or other obligation, which the pledgee has a right to repledge, without the pledgor's consent, but that such new transaction would not change the character of the chattels as being hypothecated for debt, was proper, as between the original parties.

Pledges—"Once a Pledge Always a Pledge"—Extinguishment.

7. The principle of once a pledge always a pledge applies to chattels hypothecated for a debt until their status has been changed by foreclosure of the lien of pledge or further contract of the parties.

Trover and Conversion—Elements—Sale of Pledge—Instructions.

8. A charge in an action for conversion of corporate stock that if the stock was pledged to the defendant only to secure money with which to repay the defendant for moneys advanced, defendant would have no authority to sell the stock outright, and that if he did, it would constitute a conversion, calling for a verdict for the plaintiff for the reasonable value of the pledge, not exceeding the sum mentioned in the complaint, was proper, in view of the continuing character of the contract of pledge.

Trover and Conversion—Elements—Tender—Discharge of Lien of Pledge—Instructions.

9. Where, in an action for conversion, plaintiff alleged sale by defendant of corporate stock held as collateral for a debt due defendant, which transaction defendant pleaded was a sale of stock to a third person, with an option from the vendee to plaintiff to repurchase on a certain date, at a stipulated price, the court instructed the jury that if the shares were pledged as a security and the plaintiff had tendered or offered to pay the debt, being at the time able, ready, and willing to make the payment, the lien of the defendant would be discharged, and his refusal to return the pledge would be a conversion thereof, on account of which the jury should find for the plaintiff for the reasonable value of the property, not exceeding the amount stated in the complaint, was proper, as such conduct, if found to exist, constitutes conversion, as it is the exercise of an unjustifiable control over plaintiff's property, in derogation of his title to the same.

Damages—Mitigation—Plea of Indebtedness in Conversion—Theory of Pleadings.

10. A defendant, sued for damages for conversion of corporate stock alleged to be pledged to him to secure a debt of plaintiff for advance made by defendant, pleaded general denial and as a separate defense that the transaction was in fact a sale to another with option from the vendee to plaintiff to repurchase on a certain date at a stipulated price, but did not attempt to state any defense for the indebtedness by way of mitigation. *Held*, that defendant is in no position to complain that the court erred in not taking the indebtedness into consideration in the instruction; the theory of the court excluding the subject thereby conforming strictly to the pleadings.

Damages—Mitigation—Necessity for Plea.

11. In a pledgor's action against the pledgee for a conversion of pledged corporate stock, defendant should be required to plead the original indebtedness in mitigation because the jury might actually deduct the amount of the debt and there would be nothing which the pledgor-debtor could plead in bar of a subsequent action to recover it, and because, if litigated in the trover action, the resulting judgment will protect him.

Trial—Instructions—Evidence.

12. An instruction in such an action allowing recovery for plaintiff for the reasonable market value of the shares of stock at the time of conversion is erroneous where there is no evidence of market value.

Trial—Instructions—Conversion—Elements of Damage.

13. An instruction in such an action, that if the jury finds for the plaintiff, damages should be given him for the reasonable value of

the stock, and in ascertaining the reasonable value, the jury should consider the reasonable market value of the "assets" of the corporation, if any, in arriving at the reasonable value of the stock, the verdict to be for such amount as the stock was found to be reasonably worth, *held*, prejudicially erroneous as limiting the jury to a consideration of the assets alone and excluding a consideration of the evidence in the record of the indebtedness of the corporation; both being necessary considerations.

From Union: JOHN W. KNOWLES, Judge.

In Banc. Statement by MR. JUSTICE BURNETT.

This action is one in the usual form charging the defendant with the conversion of 15 shares of stock in the Union County Farm Company, a corporation, of the value of $9,812.50, the property of the plaintiff, to his damage in that sum.

The answer denies the whole complaint, except as otherwise stated, and then in substance avers that the plaintiff being the owner of the stock mentioned, sold the same to a brother of the defendant taking from the vendee an option to repurchase it on a certain date at a stipulated price and that this transaction constitutes the conversion described as a cause of action.

Substantially the reply controverts the defendant's pleading so far as inconsistent with the complaint and in addition thereto declares:

"That plaintiff at no time bargained and sold said certificate of stock to John G. Johns, and has never at any time seen said John G. Johns and did not know of said John G. Johns until about the 20th day of March, 1914; that no lien as claimed by said John G. Johns or by defendant has ever been foreclosed and on the 22d day of March, 1915, plaintiff, in writing offered to pay defendant and said John G. Johns the sum of $1,440.00, which is the sum of $1,382.73 with interest thereon from the said 10th day of December, 1913, until the date of said offer of payment. That the defendant thereupon refused to return the said certificate of stock upon demand by this plaintiff and still refuses so to do."

The outcome of a jury trial was a judgment for the plaintiff, from which the defendant appeals.

REVERSED AND REMANDED. REHEARING DENIED.

For appellant there was a brief over the name of *Messrs. Crawford & Eakin,* with an oral argument by *Mr. Thomas H. Crawford.*

For respondent there was a brief over the name of *Messrs. Cochran & Eberhard,* with oral arguments by *Mr. George T. Cochran* and *Mr. Colon R. Eberhard.*

MR. JUSTICE BURNETT delivered the opinion of the court.

1. At the close of the plaintiff's case the defendant moved for a judgment of nonsuit which was denied, and this is assigned as error. On the other hand the plaintiff points out that the bill of exceptions does not disclose any objection by the defendant to this ruling and hence that it cannot be assigned as a reason for reversal, maintaining that it is not error alone but a mistake to which an exception has been regularly taken that will avail the appellant in this court. The defendant seeks to avoid this argument by reference to the statute which says:

"No exception need be taken or allowed to any decision upon a matter of law, when the same is entered in the journal, or made wholly upon matters in writing and on file in the court": Section 172, L. O. L.

The defendant urges that the written bill of exceptions fulfills this rule of procedure so that the decision is indeed made upon matters in writing and on file in the court. We cannot concur in this view because the ruling was not made wholly upon written data then before the Circuit Court. When it was made

the determination of the application for nonsuit depended mainly upon the oral testimony which the judge had heard, and although that has been reduced to writing by the official stenographer since then, and appears in certified form attached to the bill of exceptions, yet it does not alter the situation as it existed before the Circuit Court when the motion was denied. The recitals of the bill of exceptions relate to matters already past when that document was framed. It narrates that the defendant objected or, in other words, demurred to the sufficiency of the plaintiff's testimony, but it does not appear therefrom that any objection was made to the ruling of the court on the motion for a nonsuit. This much to settle the question of practice suggested by the discussion to which allusion has been made. In brief, the bill of exceptions must not only show what the ruling was, but also that the party appealing objected to the decision at the time it was made.

2. On the merits, however, the determination of the motion for a nonsuit was correct for we find in the report of the testimony sent up for the purpose of explaining the matter that there was enough to take to the jury the question of whether the deposit of the stock with the defendant was a pledge or a sale. The statement of the defendant that he had taken the shares as collateral, as related by the witness Holmes, and his other admission to the same witness that the stock had been pledged to him for the loan are sufficient in themselves to support the ruling on the motion. This being true it eliminates from our consideration the error assigned on the refusal of the court to direct a verdict for the defendant at the close of all the testimony.

3. From the evidence it appears that Morgan was the owner of an undivided third of a tract of agricultural land in Union County, the remainder of which was the property of the wife of the defendant for whom the latter was acting. This realty was heavily encumbered. The plaintiff had farmed the same during the crop year of 1913 and when settlement of their affairs was made at the end of the season he lacked $1,282.73 of having money enough to pay his share of the expenses and what was due at the time upon the encumbrances. It seems that the defendant arranged to advance that money for him. In connection with the transaction, they formed the corporation mentioned in the complaint and one third of the capital stock, fifteen shares, was issued to the plaintiff. His contention is that he pledged the same to the defendant to be used in raising money to pay his balance of the indebtedness; while the latter maintains that the plaintiff sold the stock absolutely to the person named in the answer as vendee. As all this was done concurrently with the formation of the company naturally there could be no market value of the stock for there had been no sale for the same. In that connection the defendant requested the court to charge the jury thus:

"I further instructed you that there is no evidence in this case upon the question of the market value of this stock, or as to whether or not it had a market value and that if you find for the plaintiff in this case, you can only find for nominal damages,—that is, one cent, or one dollar, or some nominal sum."

It was no error to refuse this instruction because it excluded from the consideration of the jury the actual reasonable value of the stock although it was not known in the market and hence could not have what is called market value.

4, 5. The defendant takes exception to a charge of the court to the effect that a pledge is a transfer of personal property as a security for a debt or other obligation which the pledgee has a right to repledge without the pledgor's consent, but that this new transaction would not change the character of the chattels as being hypothecated for debt. The principle is that once a pledge always a pledge until the status of the same has been changed by foreclosure or further contract of the parties. As between the litigants the instruction was an amplified statement of this doctrine and is not subject to criticism on that ground.

6. The same precept applies to the further charge of which the defendant complains and which states in substance that if the stock was pledged to the defendant only to secure the money with which to repay himself he would have no authority to sell the same outright, and if he did it would constitute a conversion calling for a verdict for the plaintiff for the reasonable value of the pledge not exceeding the sum mentioned in the complaint.

There is assigned as error also the instruction of the court to the purport that if the shares were pledged as a security and the plaintiff had tendered or offered to pay the debt, being at the time able, ready and willing to make the payment, the lien of the defendant would be discharged and his refusal to return the pledge would be a conversion thereof on account of which the jury should find for the plaintiff for the reasonable value of the property not exceeding the amount stated in the complaint.

7. The conduct of the defendant as described in that instruction does indeed constitute a conversion because it is the exercise of an unjustifiable control over the plaintiff's property in derogation of his title to the

same. The plaint of the defendant is that the court left out of consideration the amount of the debt for which the shares were pledged. The defendant, however, is in no position to complain of this for, as stated by Mr. Chief Justice BEAN in *Springer* v. *Jenkins*, 47 Or. 502 (84 Pac. 479):

"The defendants cannot invoke this rule, because they have not pleaded the amount due on the mortgage in mitigation of damages."

8. If, indeed, the defendant has wholly made way with the plaintiff's property and is charged with the same in trover the only method by which he can put in the indebtedness as a defense is to plead it in mitigation of damages, as taught by *Springer* v. *Jenkins, supra*. In this case there is no attempt to state any such defense. The complaint on the one hand charges direct conversion. The answer denies this. No mention whatever of indebtedness is made in the defendant's pleading. For want of this he has no standing to complain of this instruction for it conforms to the pleadings made by the parties. A good reason for requiring the indebtedness charged against a chattel to be averred in mitigation of damages for conversion of the property, is that otherwise the jury might actually deduct the amount of the debt and there would be nothing in the record which the debtor could plead in bar of a subsequent action to recover it. On the other hand, if the claim is litigated in the trover action by way of reducing the damages the resulting judgment will protect the debtor from further exactions.

The remaining error assigned by the defendant is predicated upon this direction given to the jury at the trial:

"I further instruct you that if you find for the plaintiff, you should give your verdict for damages in a sum

equal to the reasonable market value of said shares of stock at the time of conversion, if any, or within a reasonable time thereafter, and if you find that the said shares of stock have no market value, then in ascertaining their reasonable value, you will consider the reasonable market value of the assets of said corporation, if any, in arriving at the reasonable value of said stock, if any, and your verdict should be for such amount as you may find said stock to be reasonably worth."

9. This charge was materially erroneous. In the first place there was no evidence about the reasonable market value of the stock for as we have seen, it had never been known on the market. It then remains to consider the rule by which to determine its reasonable value.

10. The court was wrong in limiting the jury as it did to a consideration of the reasonable market value of the assets of the corporation in arriving at the just valuation of the stock. We have almost daily instances of corporate concerns which have considerable assets but whose indebtedness far exceeds the worth of the property. It is common sense to say that the value of the stock of the institution would be nil under those circumstances. In such an investigation we must necessarily consider not only the value of the assets, but also the amount of the indebtedness. The instruction was also bad in this respect.

11. The plaintiff, however, charges that the correctness of the verdict can be ascertained by computation of figures shown in the testimony as to the amount of indebtedness and the value of the land. We cannot, however, determine from the record whether the jury took the opinion of the witnesses as to the worth of the realty at the highest price mentioned in the evidence and then deducted the amount of the indebtedness or whether they merely discounted the estimate

of the witnesses without reference to the debt. If they did the latter, it would strictly conform to the instruction of the court as to the formula for ascertaining the reasonable value of the shares. There is a diversity of views of the testimony either one of which might be assumed as a starting point in calculating the proper value of the stock to be assessed in a verdict and it is possible that a result might be figured from some of these bases substantially equivalent to the one set down by the jury. It is impossible, however, for us safely to enter upon such a quest on the record before us. The trial by jury is the proper method for solution of the question. For this mistake in directing the jury in effect to consider only the assets of the concern in assessing the value of its stock, the judgment must be reversed and the cause remanded for further proceedings.

REVERSED AND REMANDED. REHEARING DENIED.

Argued March 28, reversed and remanded April 10, rehearing denied June 19, 1917.

HOLTZ *v.* OLDS.*

(164 Pac. 583; 164 Pac. 1184.)

Contracts—Agreement to Purchase Stock—Condition Precedent—Breach.

1. Under a contract to purchase from defendants all corporate stock owned by them, "to be issued as hereinafter set out," agreement by defendants therein to make inventory of goods of corporation according to terms, *held* a covenant and condition precedent to payment, breach of which entitled plaintiffs to recover money deposited with defendants.

Contracts—Agreement to Make Supplemental Agreement—Meeting of Minds.

2. An agreement to purchase stock providing that purchasers will execute a supplemental agreement satisfactory to sellers guaranteeing

*Authorities discussing the question of effect on contract of leaving price indefinite are collated in a note in 53 **L. R. A.** 288. REPORTER.

purchase, and that buyers and said guarantor on said agreement will deposit satisfactory security to be hereafter determined, is void for uncertainty, in that it fails to specify amount of security.

Contracts—Agreement to Make Contract in Future—Effect.

3. An agreement to make a contract in the future is not binding, unless all the terms and conditions are agreed upon, and nothing left to future negotiations.

[As to reference by contracting parties to future contract in writing as negativing existence of present contract, see note in Ann. Cas. 1912B, 130.]

ON PETITION FOR REHEARING.

Interest—Absence of Contract—Statute.

4. In the absence of a contract to pay interest, the right to exact it must be found in the statute.

Interest—Accrual of Right—Nature of Liability.

5. Under Section 6028, L. O. L., providing that the rate of interest shall be 6 per cent "on money received to the use of another and retained beyond a reasonable time without the consent of another," etc., plaintiffs were not entitled to interest from date of deposit on money deposited with defendants as security for the purchase of stock under a contract void for uncertainty and recovered by plaintiffs in an action for money had and received, which was honestly litigated by defendants.

Interest—Statutes—Construction.

6. As interest statutes are in derogation of the common law, they must be strictly construed.

From Multnomah: THOMAS J. CLEETON, Judge.

This is an action by Max Holtz and Aaron Holtz against William P. Olds, Hardy C. Wortman and Charles W. King. From a judgment for defendants, plaintiffs appealed. Reversed and remanded, with directions.

Department 1. Statement by MR. JUSTICE BURNETT.

Mentioned in this litigation is a corporation called Olds, Wortman & King. For convenience it will be styled the corporation. The individual defendants are William P. Olds, Hardy C. Wortman and Charles W. King who will be spoken of either as the defendants or by their individual surnames. The dispute between the parties arises out of a contract in writing dated

March 11, 1911, between the plaintiffs as parties of the second part and the defendants as parties of the first part, the execution of which is admitted. The corporation is a large and well-known mercantile concern in Portland. The writing recites:

"That for and in consideration of the sum of One Dollar ($1.00) paid by the parties of the second part to the parties of the first part, receipt whereof is hereby acknowledged, the parties of the first part do hereby agree to sell, assign, transfer and set over unto the parties of the second part one third of the capital stock * * of the corporation * * to be issued as hereinafter set out, owned and controlled by them, and further agree to keep and perform such other agreements and acts as are herein set out."

Provisions are then made in the instrument for an accurate inventory by the defendants of the stock of goods owned by the corporation as of July 15, 1911, the value of which was to be determined by the cost price thereof, varied by certain factors not important here. The liabilities of the concern were to be deducted and the remainder was to constitute the basis for preferred stock afterwards to be issued according to a plan formulated by the contract for an increase of the capital stock of the corporation. The instrument then provides that upon a satisfactory showing on or before July 15, 1911, the date set for the transfer of the property, that the plaintiffs had deposited in a national or state bank in Portland, approved by the defendants, a sufficient amount of cash or New York exchange in escrow to be paid or delivered to the defendants as the first payment required by the stipulation, "then and in that case" the parties of the first part would cause the stock of the corporation to be increased to $4,000,000, divided into 40,000 shares of $100 each, of which $1,700,000 more or less divided into 17,000 shares more

or less of $100 each should be preferred stock, it being the intention to authorize and issue preferred stock for approximately $200,000 in excess of the net value of the assets of the corporation. After providing details of the preference of that species of stock the defendants covenanted that they would cause the corporation to issue the same to its stockholders in an amount equal to the net value of the tangible assets of the concern as determined by the rules specified in the contract and that their common stock should be retired. Then follow these clauses:

"It is further mutually understood and agreed by and between the parties hereto that after such capital stock shall be issued to the present stockholders in an amount equal to the net value of the tangible assets determined as herein provided, that the parties of the first part for the consideration herein expressed, agree to sell, and for the same considerations the parties of the second part agree to buy one third of the total number of shares of the preferred stock held by the parties of the first part, and agree to pay for the same in cash or New York exchange acceptable to the parties of the first part on or before July 15, 1911, at One Hundred Dollars ($100.00) per share, and upon such payment the parties of the first part will cause to have delivered to the parties of the second part certificates representing one third of their holdings of preferred stock properly endorsed according to the by-laws of Olds, Wortman & King.

"It is further mutually understood and agreed that the parties of the second part do agree to and with the parties of the first part and each of them, that on or before the 15th day of July 1921, they will purchase from said William P. Olds, Hardy C. Wortman and Charles W. King, their heirs, executors, administrators or assigns, such preferred stock of the corporation of Olds, Wortman & King as may be in the hands of said parties, or either of them, and further agree that they will pay for the same at the rate of One Hundred

and Ten Dollars ($110.00) per share, with all accrued dividends to date of purchase.

"The parties of the second part hereby agree that they will cause to be made, executed and delivered to the parties of the first part a supplemental agreement, satisfactory to the parties of the first part, guaranteeing to the parties of the first part that the original issue of preferred stock held by them will be on or before the 15th day of July, 1921, purchased by the parties of the second part hereto, as herein agreed, and the parties of the second part and said guarantors on said collateral agreement will also deposit with the parties of the first part collateral security of a kind and character satisfactory to the parties of the first part, but to be hereafter determined."

There are numerous other conditions in the instrument relating to stock in another concern held by the defendants, which are not material to the decision of this case. Near the end of the document appears this provision:

"It is further mutually understood and agreed by and between the parties hereto that the parties of the second part have this day deposited with the parties of the first part cash or approved securities to the amount of Twenty Thousand Dollars ($20,000.00), which cash and approved securities of the value thereof up to the amount of Twenty Thousand Dollars ($20,000.00) shall be forfeited to the parties of the first part as stipulated damages in the event the parties of the second part shall fail to complete their purchase of one third (1–3) of the preferred stock to be issued as provided hereunder on or before the 15th day of July, 1911, and in the event the said purchase of one third (1–3) of the preferred stock shall be so completed the cash this day so deposited shall apply on account of the purchase price thereof, and in that event the parties of the first part shall allow to the parties of the second part interest on the cash deposited from the date of deposit to the date of the consummation of this agreement at the rate of four (4) per cent per annum."

The substance of the complaint is that the contract was executed, which is admitted by the defendants; and that contemporaneously therewith the plaintiffs deposited with the defendants money and approved securities to the amount of $20,000 to be applied upon the cash payment agreed to be made for the purchase of one third of the preferred stock of the corporation. The deposit itself is admitted. The plaintiffs then say in substance that they were ready, able and willing to complete the purchase of one third of the preferred stock, as stated in the contract, and exhibited to the defendants evidence of that ability; that the "defendants did not require the actual deposit of said sum in cash as a prerequisite for the increase of said preferred stock," but that after prolonged negotiations they and the plaintiffs were unable to agree upon the security contemplated to insure the purchase of the remaining two thirds of the defendants' holdings of preferred stock on or before July 15, 1921, in consequence of which the plaintiffs demanded from the defendants the return of the $20,000 deposited, which was refused. Judgment is demanded for that sum with interest from July 15, 1911.

It is admitted that the defendants refused to return the deposit, but otherwise, except as hereinbefore stated, the complaint was traversed. The answer states a supplemental agreement made March 17, 1911, admitted by the plaintiffs, reciting the contract already mentioned, and providing that the common stock to be issued to the extent of $2,300,000 more or less on the increase of the capital stock of the corporation, should be transferred to the plaintiffs and that upon the consummation of the agreement of March 11, 1911, Olds, Wortman and King would in succession resign as directors of the corporation to be succeeded by a direc-

torate satisfactory to the plaintiffs. The answer further proceeds substantially to allege the construction placed by the defendants on the original contract and to impute a default upon the plaintiffs in that they refused to carry into effect that portion of the stipulation above quoted providing for the execution of a supplemental agreement guaranteeing the purchase of the original issue of preferred stock still held by the defendants on or before July 15, 1921, and to furnish collateral security as already mentioned. The answer is traversed by the reply. At the conclusion of all the testimony the plaintiffs moved for a directed verdict in their favor for detailed reasons which will be discussed more fully hereafter, which motion was overruled. After being instructed by the court the jury returned a verdict for the defendants. The plaintiffs appealed from the ensuing judgment.

REVERSED AND REMANDED WITH DIRECTIONS.

For appellants there was a brief over the name of *Messrs. Beach, Simon & Nelson,* with an oral argument by *Mr. R. C. Nelson.*

For respondents there was a brief over the names of *Messrs. Reed & Bell, Mr. C. W. Fulton* and *Mr. T. M. Dye,* with an oral argument by *Mr. Chriss A. Bell.*

MR. JUSTICE BURNETT delivered the opinion of the court.

The plaintiffs assign as errors: (1) The judgment was erroneous because the facts stated in the answers are not sufficient to constitute a defense; and (2) the court erred in overruling their motion for a directed verdict. The principal ground for this motion was that the contracts, the execution of which is admitted, are void for

uncertainty in that the nature of the security mentioned was left open for future determination.

There is but little dispute, if any, about the substantial facts of the case. It appears that after signing the contract the plaintiff Max Holtz went to New York to arrange for funds with which to carry out the contract and returned to Portland some time in June, 1911. Negotiations were then taken up between the parties on the subject of security for the subsequent purchase of the remainder of the defendants' preferred stock yet to be issued, but they were unable to agree on that feature and after protracted discussions, covering some ten days, all further proceedings were abandoned and later on this action was commenced.

1. It is disclosed by the testimony that aside from the deposit by the plaintiffs with the defendants of $20,000, nothing was done by either party about performance of the contract after its execution, except to engage in fruitless discussions about the collateral designed to guarantee the purchase of the remainder of the preferred stock held by the defendants prior to July 15, 1921. It was the evident intention of the parties that the plaintiffs should purchase all the holdings of the defendants in the preferred stock of the concern yet to be issued. In order to arrive at the basis upon which that stock should be called into existence it was necessary to take an inventory of the property of the concern, value it according to rules laid down in the stipulation and lastly deduct therefrom the liabilities of the firm. This duty rested upon the defendants and was to be performed before the plaintiffs were required to make the first payment. We note that this was what was required to be paid for the one third of the holdings of the defendants in the preferred stock. Making the inventory was necessarily a condition

precedent because without it there was no basis within the contemplation of the contract upon which the amount of preferred stock could be calculated. The obligation imposed upon the plaintiffs to deposit the purchase price of one third thereof in escrow was not required to be performed until the inventory had been taken and the net value of the assets ascertained.

The next step in the process of performance of the contract would have been to augment the stock and to deliver the preferred part thereof to the stockholders of the corporation, for it is said in the contract, after speaking of the deposit to be made in escrow, that "then and in that case the parties of the first part" will increase the capital stock and distribute the same among the stockholders. The next in order of time was the purchase of a third of what was owned by the defendants, for we find in the contract "that after such capital stock shall be issued to the present stockholders" the defendants agreed to sell and the plaintiffs to buy that portion of the total number of shares of preferred stock held by the defendants and to pay for the same in cash or New York exchange on or before July 15, 1911. If we should consider the agreement as solely for the purchase of one third of the stock, the defendants were clearly in default in performance of their part of the contract for, after the execution thereof, the first thing to be done by them was the making of the inventory which they utterly failed to perform. The principle is well settled that where something is to be done by the first party before the other is called upon to act it is an independent covenant to be performed before that other can be said to be in default: *Couch* v. *Ingersoll*, 2 Pick. 292; *Dey* v. *Dox*, 9 Wend. 129 (24 Am. Dec. 137); *State* v. *Winona etc. R. R. Co.*, 21 Minn. 472; *Mill Dam Foundry Co.* v.

Hovey, 21 Pick. 417; *Standard Gas Light Co.* v. *Wood,* 61 Fed. 74 (9 C. C. A. 362). The plaintiffs are entitled to consider the failure of the defendants to perform their part of the contract at the time and in the order required thereby as a breach of the covenant upon which an action will lie in favor of the plaintiffs to recover the money deposited.

2. But further, as stated, if anything is plain in the contract it is that all parties intended that it should culminate in the purchase by the plaintiffs of all the holdings of the defendants of the preferred stock yet to be issued by the corporation at the latter's behest. Confessedly, by the testimony on behalf of the defendants, the rock upon which the scheme perished was the stipulation about the security to be posted guaranteeing the purchase of the remainder of their holdings on or before July 15, 1921. This was an integral part of the contract but it is plain that the writing leaves a wide gap between mere negotiations of the parties and the actual formation of the contract as to that feature. The language used in that respect contemplates that there shall be guarantors accompanying the plaintiffs in the execution of what is there called a supplemental agreement. These underwriters are not specified by name or qualification and unknown though they were, the document required them to deposit collateral security of a "kind and character satisfactory to the parties of the first part but to be hereafter determined."

Passing the question of whether a stipulation for satisfactory security is sufficiently definite to be binding, we note that there is not a hint about the amount of such security. Indeed, the quantity thereof could not be well specified in advance, because at that time the net value of the assets of the corporation to be ascer-

tained by the procedure laid down in the contract was yet unknown and consequent upon that fact was the circumstance that the amount of preferred stock of the concern was not yet determined, and still further, it was not disclosed what amount thereof would be apportioned to the individual defendants. With all these factors in mind it is plain why the amount of collateral required by the terms of the guaranteeing contract could not be stated beforehand under the other terms of the agreement as written. That provision is therefore void for uncertainty.

3. In *St. Louis & S. F. R. R. Co.* v. *Gorman,* 79 Kan. 643 (100 Pac. 647, 28 L. R. A. (N. S.) 637), it was held that an agreement to make a contract in the future is not binding unless all the terms and conditions are agreed upon and nothing is left for future negotiations. In *Butler* v. *Kemmerer,* 218 Pa. 242 (67 Atl. 332), it was held that an agreement must contain all the terms necessary to determine whether the contract had been performed or not; that price is as essential as any other of the terms of the stipulation and that without this agreed upon no contract exists. In the *United Press* v. *N. Y. Press Co.,* 164 N. Y. 406, 412 (28 N. E. 527, 529, 53 L. R. A. 288), Mr. Justice GRAY speaking for the court said:

"I entertain no doubt that, where work has been done, or articles have been furnished, a recovery may be based upon *quantum meruit* or *quantum valebant;* but, where a contract is of an executory character and requires performance over a future period of time, as here, and it is silent as to the price which is to be paid to the plaintiff during its term, I do not think that it possesses binding force. As the parties had omitted to make the price a subject of covenant, in the nature of things, it would have to be the subject of future agreement, or stipulation, and, to use the language of

the opinion in *Buckmaster* v. *Consumers' Ice Co.*, 5 Daly, 313, if the price each week was to be by future agreement, the contract was not legally binding on either party, as neither could be compelled to agree with the other."

Other precedents pertinent to this point are *Shepard* v. *Carpenter*, 54 Minn. 153 (55 N. W. 906); *Sibley* v. *Felton*, 156 Mass. 273 (31 N. E. 10); *Foot* v. *Webb*, 59 Barb. (N. Y.) 38; *Dayton* v. *Stone*, 111 Mich. 196 (69 N. W. 515); *Gaines* v. *Vandecar*, 59 Or. 187 (115 Pac. 721, 1122); *Jackson* v. *Alpha Portland Cement Co.*, 106 N. Y. Supp. 1052; *Somers* v. *Musolf*, 86 Ark. 97 (109 S. W. 1173); *Edmondson* v. *Fort*, 75 N. C. 404. As stated in Clark on Contracts (3 ed.), p. 52:

"An agreement to be finally settled must comprise all the terms which the parties intend to introduce into the agreement. An agreement to enter into an agreement upon terms to be afterwards settled between the parties is a contradiction in terms. It is absurd to say that a man enters into an agreement till the terms of that agreement are settled."

It is indeed competent for parties to enter into a preliminary agreement looking to the execution of a consequent one in the future. We have daily examples of that kind in bonds for deeds or in contracts for insurance, the policies of which are yet to be issued. But in all cases the minds of the parties must meet on the terms not only of the present convention, but also as to those of the covenants yet to be executed. If this rule be not observed in the stipulation and a substantial part is left open for further settlement without a canon by which the subsequent negotiations may be controlled there is no *aggregatio mentium* so essential to every contract. Tested by this standard, under the authorities cited, the admitted document was void for

uncertainty in a material particular and was devoid of obligatory force upon the parties. Under these circumstances, independent of the default of the defendants in failing to make the inventory mentioned, the plaintiffs were entitled to disregard the terms of the document and to recover the money they had deposited with the defendants. The Circuit Court should have directed a verdict in favor of the plaintiffs for $20,000 and rendered judgment thereon. Under the doctrine of *Sargent* v. *Am. Bank & Trust Co.*, 80 Or. 16, 38 (156 Pac. 431), and *Carnahan Mfg. Co.* v. *Beebe-Bowles Co.*, 80 Or. 124 (156 Pac. 584), the plaintiffs are not entitled to recover interest on the deposit. The judgment of the Circuit Court will therefore be reversed and the cause remanded with directions to enter a judgment for the plaintiffs against the defendants for $20,000, together with the costs and disbursements of both courts.

REVERSED AND REMANDED WITH DIRECTIONS.

MR. CHIEF JUSTICE MCBRIDE, MR. JUSTICE BENSON and MR. JUSTICE HARRIS concur.

Denied June 19, 1917.

ON PETITION FOR REHEARING.

(164 Pac. 1184.)

Petition for rehearing. Rehearing denied.

Messrs. Reed & Bell, Mr. Charles W. Fulton and *Mr. T. M. Dye,* for the petition.

Messrs. Beach, Simon & Nelson, contra.

Department 1. MR. JUSTICE HARRIS delivered the opinion of the court.

The original opinion awarded the plaintiffs a judgment for $20,000 without interest. The plaintiffs insist that they are entitled to interest on $20,000 from July 15, 1911.

The defendants honestly and in good faith denied and litigated the right of plaintiffs to recover; and therefore if the rule announced in *Baker County* v. *Huntington*, 48 Or. 593, 603 (87 Pac. 1036, 89 Pac. 1044), is adhered to, it would prevent the allowance of interest. There is, however, a more persuasive reason for disallowing interest.

4–6. In the absence of a contract to pay interest the right to exact it must be found in the statutes. *Sorenson* v. *Oregon Power Co.*, 47 Or. 24, 34 (82 Pac. 10). Before the plaintiffs can successfully claim the allowance of interest they must show that they come within the terms of Section 6028, L. O. L., as it read prior to the amendment found in Chapter 358, Laws 1917. The plaintiffs have not brought themselves within any clause of Section 6028, L. O. L., as that statute is interpreted by *Sargent* v. *American Bank and Trust Co.*, 80 Or. 16, 42 (154 Pac. 759, 156 Pac. 431), unless they are within the clause which allows interest "on money received to the use of another, and retained beyond a reasonable time, without the owner's consent, expressed, or implied"; and, hence, we must first determine the meaning of the quoted clause before we can know whether it is available to the plaintiffs. Interest statutes are in derogation of the common law and for that reason must be strictly construed: 22 Cyc. 1481. The action prosecuted by the plaintiffs assumed the form of the "equitable action" commonly designated as an action for money had and received. The basis

of the claim of the plaintiffs was that the defendants had $20,000 which in justice and good conscience ought to be paid to the plaintiffs; and it was upon this theory that the judgment was rendered against the defendants: *Hoyt* v. *Paw Paw Grape Juice Co.,* 158 Mich. 619 (123 N. W. 529); *Todd* v. *Bettingen,* 109 Minn. 493 (124 N. Y. 443); *Ulbrand* v. *Bennett,* 83 Or. 557 (163 Pac. 445, 446); 27 Cyc. 854. Applying the rule of strict construction the language of the clause quoted from Section 6028 is not sufficiently comprehensive to include the instant case. If A pays money to B to be given to C, the money has been received by B to the use of C. From the moment of the payment to B the money belongs to C and not to B, for it was in fact received for the use of C and at no time is B the owner of the money. Interest can be allowed only when two elements combine: (1) The money must be received to the use of another; and (2) it must be retained beyond a reasonable time without the owner's consent. When the statute speaks of money received to the use of another it means money which in fact is received to the use of another; it does not include money which, by the aid of a legal fiction interposed after the actual receipt of the money, is treated as money received to the use of another; it means money that *is* received to the use of another as distinguished from money which is merely regarded *as* money received to the use of another. That this interpretation is not unduly narrow is confirmed by the words "and retained beyond a reasonable time, without the owner's consent." The statute contemplates that the person who actually has the money is at no time the owner, but he has only received the money to the use of another who is in truth the owner during all the time. When the statute speaks of the consent of the owner it necessarily signi-

fies that some person other than the holder of the money is in fact, and not by reason of a fiction, the owner. While the conclusions expressed in *Graham* v. *Merchant*, 43 Or. 294, 311 (72 Pac. 1088), have neither been overlooked nor ignored, nevertheless, a strict construction of the interest statute will not permit the plaintiffs to recover interest. The petition is denied.

REHEARING DENIED.

MR. CHIEF JUSTICE MCBRIDE, MR. JUSTICE BENSON and MR. JUSTICE BURNETT concur.

Argued May 24, reversed June 19, 1917.

LA GRANDE NAT. BANK *v.* OLIVER.

(165 Pac. 682.)

Chattel Mortgages—Priorities—Landlord's Lien—Replevin.

1. Where a landlord had a lien on crops under the terms of the lease to secure promissory notes taken for rent, and gave such notes to a bank for collection, and the bank subsequently with notice of landlord's claim took a chattel mortgage upon the crops, the landlord could have recovered the crops in replevin, alleging himself to be the owner and proving the averment by showing that he had a lien upon the property as against the chattel mortgagee who had actual notice of his claim, although the lien may not have been recorded.

Landlord and Tenant—Lien for Rent—Proceeds of Property.

2. By virtue of his qualified property in the crop, the landlord was authorized to follow it as far as he could trace it, and to sue at law for substituted property, and it having been converted into money, his right of property attached to the money at his option to the extent of his lien on the crop from which the cash was derived.

[As to landlord's lien on tenant's property for rent, see note in 119 Am. St. Rep. 122.]

Setoff and Counterclaim—Subject Matter—Claims Arising on Contract.

3. Under Section 74, L. O. L., providing that a counterclaim authorized by Section 73 must be one existing in favor of a defendant and against a plaintiff between whom a several judgment might be had in an action arising on contract or any other cause of action arising also on contract, and existing at the commencement of the action, where a landlord took promissory notes from his tenant secured by the terms of the lease by a first lien on the crops and placed such notes

with a bank for collection, and the bank with notice of such lien subsequently took a chattel mortgage on the crops, and when the crops were sold took the money and applied it to the payment of its mortgage instead of crediting it on the notes, in a suit by the bank against the landlord upon a note, the landlord was entitled to assert his claim to the proceeds by way of counterclaim upon an implied contract as for money had and received by the third person to the landlord's use.

Action—Waiver of Tort.

4. The chattel mortgagee having been fully aware of the landlord's property in the money, and having gained possession of the money which belonged to the landlord, although an action in tort for damages would lie upon such transaction, the landlord had an election to proceed upon an implied contract as for money had and received to his use.

From Multnomah: Robert G. Morrow, Judge.

This is an action by the La Grande National Bank, a banking corporation, against E. W. Oliver. From a judgment in favor of plaintiff, the defendant appealed. Reversed and new trial ordered.

Department 1. Statement by Mr. Justice Burnett.

The plaintiff declares in the ordinary form upon a promissory note given by the defendant January 30, 1913, for $1,700, with interest at eight per cent per annum, which it avers "is wholly unpaid, except $16.33, paid on March 27, 1913."

The amended answer, upon which the case was tried, admitted the execution of the note, but denied that it was wholly unpaid except $16.33, and for new matter stated in substance that the defendant, being the owner of, among others, two notes given by his tenant for rent of the defendant's farm for the years 1910 and 1911, upon the first of which was due $616.64, with interest from October 1, 1910, and upon the other $3,420, with interest since October 1, 1911, deposited them with the plaintiff for collection to his account; that by the terms of the lease the notes were secured by a first lien on all grain that was grown on the demised premises; that at the time he delivered the notes to the plaintiff he

also placed the lease in its custody and likewise informed it that according to the provisions of that document the notes were secured by a first lien on the grain; that afterwards with knowledge of all this the plaintiff took a chattel mortgage from the tenant on the self-same crop to secure its own claim against him; and lastly, that when the grain was sold the plaintiff took the proceeds and instead of applying them to the payment of the defendant's notes left with it for collection, liquidated its own demand against the defendant, absorbing all the proceeds except $16.33, which it only then credited on defendant's note upon which this action is based. The answer further alleges that at the time the proceeds of the crop were collected there was due upon the defendant's notes deposited by him with the plaintiff, $4,109.59, and that after deducting the full amount of the note sued upon, there is due from the plaintiff to the defendant a balance named in the answer for which the latter demands judgment.

The reply denied the new matter in the answer. The Circuit Court refused to allow any proof of the defendant's averments and directed a verdict for the plaintiff for the full amount of the note described in the complaint together with an attorney's fee. From the ensuing judgment the defendant appeals.

Reversed for New Trial.

For appellant there was a brief over the names of *Mr. James G. Wilson* and *Mr. Turner Oliver*, with an oral argument by *Mr. Wilson*.

For respondent there was a brief over the names of *Mr. Charles H. Finn* and *Mr. W. J. Makelim*, with an oral argument by *Mr. Finn*.

Mr. Justice Burnett delivered the opinion of the court.

According to the bill of exceptions the trial judge seems to have proceeded upon the theory that the diversion by the bank of the proceeds of the sale of the grain from the payment of defendant's lien thereon to the liquidation of its own chattel mortgage upon the same crop was solely a conversion sounding in tort which could not be made the basis of a counterclaim in an action arising upon contract.

1, 2. If the defendant had a lien upon the crop he could have recovered the grain in replevin alleging himself to be the owner thereof and proving the averment by showing the fact that he had a lien upon the property at least as against those who had actual notice of his claim although the same may not have been recorded: *Reinstein* v. *Roberts,* 34 Or. 87 (55 Pac. 90, 75 Am. St. Rep. 564). We note in passing that it is charged in the answer that the plaintiff knew the nature and extent of the defendant's lien upon the grain afterwards included in the plaintiff's chattel mortgage. By virtue of his qualified property in the crop the defendant was authorized to follow it as far as he could trace it and to sue at law for the substituted property: *Terry* v. *Munger,* 8 L. R. A. 216, 218, note. It having been converted into money, the defendant's right of property attached to that money at his option to the extent of his lien on the crop from which the cash was derived.

3, 4. The plaintiff was fully aware of the nature and extent of the defendant's property in the specie, and having gained possession of the money which in equity and good conscience, according to the allegations of the answer, belonged to the defendant, the latter was not compelled to sue in tort for damages arising from the wrongdoing of the plaintiff. He was entitled to

bring an action as for money had and received which sounds in contract. As stated in 1 C. J., p. 1033, Section 159:

"The rule is well settled that, where personal property has been wrongfully taken and converted into money or money's worth, the owner may waive the tort and sue the wrongdoer in contract for money had and received, upon the theory that he ratifies the sale as made for his benefit and sues to recover the proceeds as money had and received to his use"—citing many authorities.

In such cases the law implies a promise, or in other words, a contract on the part of the recipient of the money to pay it to the one to whom it justly belongs. Some precedents illustrating various conditions under which the action for money had and received will lie are collated in *Wagener* v. *United States National Bank,* 63 Or. 299 (127 Pac. 778, 42 L. R. A. (N. S.) 1135). True indeed it is, that an action for damages would lie upon such a transaction; but the one who is rightly the owner of the money has the election to proceed upon the implied contract as for money had and received and the authority to choose is vested in him. The other party cannot elect that he himself shall be sued for the tort and not upon the implied contract.

The action here being upon a note is one arising on contract and it is said in Section 74, L. O. L., in its amended form that

"the counterclaim mentioned in section 73 must be one existing in favor of a defendant and against a plaintiff between whom a several judgment might be had in the action and arising out of one of the following causes of action. * * 2. In an action arising on contract, any other cause of action arising also on contract, and existing at the commencement of the action."

Embodied in the answer, therefore, we have a statement of facts out of which the law raises the implied

contract on the part of the plaintiff to pay to the defendant the money derived from the crop which was burdened by the defendant's lien to the extent of that encumbrance. The situation thus is one to which the statute above quoted applies and the matter stated in the answer amounts to a "cause of action arising also on contract" within the meaning of the code.

The matter is plain: If we suppose that the lien of the defendant had been foreclosed making the plaintiff a party defendant to the proper proceeding for that purpose, and that in pursuance thereof the grain had been sold, there can be no question to whom the money in the first instance would have belonged at least covering the defendant's lien upon the property. The only disposition which rightly could have been made in such a case would have been first to pay the defendant the amount of his notes which he left with the plaintiff for collection and next to apply the surplus, if any, to the liquidation of the plaintiff's chattel mortgage. According to the averments of the answer the plaintiff, in substantially such a juncture, diverted the money from the satisfaction of the defendant's lien to the payment of its own inferior claim thus carrying the proceeds into its own possession with the result that it had and received to the use of the defendant the amount of his notes in its hands to be collected making itself amenable to an action arising on the contract which the law imputes to it to pay to the defendant what it had thus received. The court was in error in refusing to allow the defendant to prove the allegations of its answer. The judgment is reversed for a new trial. Reversed for New Trial.

Mr. Chief Justice McBride, Mr. Justice Harris and Mr. Justice McCamant concur.

Argued May 29, reversed and remanded June 19, 1917.

LINDSTROM v. NATIONAL LIFE INS. CO.*

(165 Pac. 675.)

Insurance—Avoidance—Estoppel—Physician's False Answers in Application.

1. If an applicant for life insurance makes truthful statements to medical examiner, who, without applicant's knowledge, changes answers to questions in application to make it appear that insured is a safe risk, insurer will be liable on the policy issued in consequence of the deceit of its agent.

Insurance—Action on Policy—Reply—Knowledge of False Statements in Application—"Collusion."

2. In action on a life policy, reply stating that insured signed application without "collusion" with medical examiner did not allege insured's lack of knowledge of physician's statements therein, the word "collusion" meaning a secret agreement and co-operation for a fraudulent or deceitful purpose; a playing into each other's hands; deceit; fraud.

Insurance—Action on Policy—Sufficiency of Evidence—Knowledge of False Statements in Application.

3. In an action on life policy, evidence *held* to justify inference that insured truthfully answered medical examiner's questions, and the latter changed answers in application without insured's knowledge.

[As to effect of insurer's agent inserting in application false statements or answers by insured, see note in 9 **Am. St. Rep.** 229.]

Pleading—"Aider by Verdict."

4. The absence from a written statement of facts constituting a cause of action or defense of a material averment will not be supplied by a verdict, but such finding will cure a defective statement in a pleading, the principle of the rule being that, where pleading is sufficiently general to comprehend matter so essential to be proved that, had it not been given in evidence, the jury could not have found the verdict, the want of the statement of such matter in express terms will be cured by the verdict, because evidence of the fact would be the same whether the allegation is complete or imperfect; but, where a material allegation is wholly omitted, it cannot be presumed that any evidence referring to it was offered on the trial.

Pleading—Aider by Verdict—Action on Life Policy.

5. In action on a life policy, where reply stated that medical examiner's misstatements in application were made without "collusion" instead of that they were made without insured's knowledge, a verdict for plaintiff cured the imperfection, since, if the matter had been called to the attention of the trial court, an amendment would probably have been allowed.

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*On effect of agent's insertion in the application of false answers to questions correctly answered by the insured, see notes in 4 **L. R. A. (N. S.)** 607; **L. R. A.** 1915A, 273. REPORTER.

Fraud—Allegations in General.

6. A pleading alleging fraud must aver falsity of representations, defendant's knowledge thereof, that they were made with intent to defraud, and that the party seeking relief relied thereon.

Insurance—Action on Policy—Sufficiency of Reply—Fraud Inducing Release.

7. In action on life policy the reply was insufficient to show that beneficiary was fraudulently induced to execute alleged release, where it failed to charge that insurer knew falsity of representations, or that they were recklessly made, or that they were made with intent to deceive.

From Multnomah: WILLIAM N. GATENS, Judge.

Department 2. Statement by MR. JUSTICE MOORE.

This is an action by Eda J. Lindstrom against the National Life Insurance Company of the United States of America to recover upon a policy of insurance. The complaint alleges in effect that, on April 17, 1913, the plaintiff was the wife of Oscar F. Lindstrom; that the defendant then and at all times thereafter was and is a corporation and authorized to do business in Oregon; that on that day the defendant in consideration of $51.67 executed to Oscar F. Lindstrom a policy of insurance by the terms of which it agreed to pay plaintiff $1,000 upon receipt of the proof of the death of the assured during the continuance of such contract; that on April 3, 1914, and while the policy was in force, Oscar F. Lindstrom died; that within proper time thereafter the plaintiff furnished due proof of such death to the defendant, which failed and refused to pay the sum specified.

The answer denies the material averments of the complaint, and for a further defense alleges that Lindstrom's application for insurance became a part of the policy which was issued; that in such request he represented that all answers made to the medical examiner were full, true, and complete; that Lindstrom signed the report of the medical examination, which was made

a part of the application, and thereby warranted that the answers which he made to the medical examiner had been read by him; that they were true, full, and complete and should form the basis for the contract of insurance; that he fraudulently represented he had not within five years employed or consulted a physician for any ailment and falsely stated he had not been treated for or afflicted with any renal or urinary disease; that he had within such period employed a physician who gave him an unfavorable opinion in respect to his health as an insurance risk; that at the time of the making of such application Lindstrom was suffering from kidney and vesical diseases, particularly describing them. For a second affirmative defense it is averred generally that notwithstanding liability under the contract has at all times been and now is denied by the defendant, in order to avoid annoyance and expense, it effected a compromise settlement with the plaintiff June 22, 1914, whereby there was paid to and accepted by her as such beneficiary, in full satisfaction of all claims and demands under the policy, $100, which sum she retains with full knowledge of all the facts set forth herein, thereby authorizing the defendant to annul the contract of insurance.

The averments of new matter in the answer were denied in the reply, which alleged in effect that Oscar F. Lindstrom correctly answered all questions asked him by the medical examiner giving a full, complete, and truthful statement of his health and physical condition; that the answers so made were written by the medical examiner; that if the answers set forth in the application are in any respect false they were so inserted in the application by the defendant's duly authorized agent after the full and exact truth had been communicated to him by Oscar F. Lindstrom, and

became a fraud and deceit on the part of the medical examiner; that Lindstrom signed the application for insurance without fraud or attempt to deceive the defendant and without collusion on his part with the medical examiner. For a further reply it is alleged generally that the pretended release was obtained from the plaintiff by the fraud of the defendant; that she was induced to sign the release by reason of false, fraudulent, and unlawful representations made by defendant to her to defraud and deceive her; that defendant represented to the plaintiff that the policy of insurance was void because of false representations which had been made by Oscar F. Lindstrom as to his condition of health, thereby causing the policy to be invalid; that the plaintiff relied upon such false and fraudulent representations and was induced thereby to sign the pretended release and to accept the sum stated under a misapprehension of law and fact as to her rights in the premises; that thereafter she elected to rescind and hereby consents that there be deducted from any judgment rendered in her favor against the defendant the sum of $100 so paid to her.

The defendant's counsel moved the court to require the plaintiff to make the reply more definite and certain by stating whether Lindstrom's answers to the medical examiner's questions were true or false, to specify what particular acts of fraud and deceit were practiced upon Lindstrom by the medical examiner to obtain his signature to the application, and to detail what false and fraudulent representations were made by the defendant to the plaintiff with respect to the declarations uttered by Oscar F. Lindstrom to the medical examiner as to the condition of his health. This motion was denied and an exception saved. A demurrer to the reply was thereupon inter-

posed on the ground that it did not state facts sufficient to constitute such a pleading. The demurrer was overruled, and the cause having been tried resulted in a verdict and judgment for $900 in favor of the plaintiff, from which the defendant appeals.

REVERSED AND REMANDED.

For appellant there was a brief over the names of *Mr. A. H. McCurtain, Mr. Samuel R. Stern* and *Messrs. Bauer & Greene,* with oral arguments by *Mr. McCurtain* and *Mr. Stern.*

For respondent there was a brief with oral arguments by *Mr. Omar C. Spencer* and *Mr. Alfred A. Hampson.*

MR. JUSTICE MOORE delivered the opinion of the court.

1. The demurrer alone will be considered. In order clearly to understand that part of the reply the sufficiency of which is thus challenged, attention will be called to cases cited by plaintiff's counsel holding in effect that if a person in applying for a policy of life insurance makes truthful statements as to his health and physical condition to a medical examiner who without the knowledge of the applicant fraudulently changes the answers to questions on that subject so as to make it appear the insured is a safe risk, the insurance company so represented by the physician is liable on a policy issued in consequence of the deceit of its agent. Thus in *Mutual Reserve Fund Life Assn.* v. *Cotter,* 81 Ark. 205 (99 S. W. 67), a headnote reads:

"Where an applicant for life insurance correctly answered the questions propounded to him by the insurance company's medical examiner, but without his knowledge the examiner wrote down incorrect answers,

the insurance company is estopped to take advantage of the wrong of its own agent."

In *Lyon* v. *United Moderns,* 148 Cal. 470 (83 Pac. 804, 113 Am. St. Rep. 291, 7 Ann. Cas. 672, 4 L. R. A. (N. S.) 247), it was ruled that the trial court properly allowed the plaintiff to prove that the insured made a true statement to the medical examiner that he had the "grippe" and a slight attack of pleurisy; and where there was no pretense that he had actual knowledge of the contents of the report, but was merely asked to sign the statement at the end thereof, the court properly instructed the jury that if he had had the disease of pleurisy and answered "No," it would be a misrepresentation of a material fact which would avoid the policy, but that if he told the true facts to the medical examiner, and he neglected or omitted to write the answer in his report, the insured was not responsible for such omission or neglect unless he had actual knowledge that the answer had been imperfectly or incorrectly written. So, too, in *Pfiester* v. *Missouri State Life Ins. Co.*, 85 Kan. 97 (116 Pac. 245), it was decided that an applicant for insurance, without knowledge to the contrary, may assume that the agent has prepared the application according to agreement, that the company has written the policy according to the application, and that he is not negligent in failing to examine such instruments for errors and omissions.

2. The part of the reply which refers to the answers alleged by the defendant to have been falsely made by the insured to questions propounded at his medical examination is as follows:

"That if said answers contained in said application * * are in any respect false or untrue they were inserted in said application by the duly authorized medi-

cal examiner and agent of defendant only after the full and exact truth had been communicated to him by the said Oscar F. Lindstrom and because of fraud and deceit on the part of said medical examiner; that the said Oscar F. Lindstrom signed the written application without fraud or attempt or intent to deceive the defendant and without collusion on his part with defendant's medical examiner."

It will thus be seen that the alterations, if any, in the answers to the medical examiner's questions are not alleged to have been made without the knowledge of the insured. Webster's New International Dictionary defines the word "collusion" used in the reply as follows: "A secret agreement and co-operation for a fraudulent or deceitful purpose; a playing into each other's hands; deceit; fraud." It is possible, therefore, that Oscar F. Lindstrom may have had full knowledge of the medical examiner's alleged scheme to defraud his principal without co-operating in any manner in such agent's deceit. The rules of practice adopted by the Circuit Court of the State of Oregon for Multnomah County, where this cause was tried, require a party who attacks an adversary's pleading by motion or demurrer also to give a written notice stating the specific question to be considered. Complying with this precept the defendant's counsel served upon the opposite party a writing which *inter alia* states:

"You are hereby notified that in arguing the foregoing demurrer we will contend that after the defendant has set forth certain questions and answers claimed to have been made by the assured to the insurance company that the plaintiff must either affirm or deny the truth of the allegation contained in said answer, and that it is not sufficient reply to plead in the alternative."

It will thus be seen that the particular question now under consideration and the alleged want of knowledge of the insured in respect to his answers as noted by the medical examiner were neither presented to nor considered by the trial court.

3. The testimony in relation to this branch of the case shows that Oscar F. Lindstrom lived upon a farm near Vernonia, Oregon; that on April 10, 1913, W. W. Lindsey, an insurance solicitor, and Dr. J. H. Flynn, a medical examiner, visited the farm house in that vicinity of Elon Malmstein, where Mr. Lindstrom was then working; that upon solicitation for insurance Mr. Lindstrom went to Mr. Malmstein's house to be examined by the physician; that Mrs. Malmstein was sitting in an adjoining room between which and the room then occupied by her visitors a door stood ajar; that she could not help overhearing the conversation; that Mr. Lindstrom told the doctor he would not take any insurance unless he successfully passed the examination, saying he had not been well, but was then feeling better, detailing all his supposed ailments, and seemingly magnifying his infirmities. In speaking of Dr. Flynn this witness stated upon oath:

"He asked a few questions, not so very many; he asked him (Mr. Lindstrom) if his parents were living, how old they were, and a few other questions * * but I cannot exactly say the ones that were asked. Then he went on and said that is all the questions you need answer now, I will fill out the rest, and fix it all right."

Mrs. Malmstein further testified:

"Doctor Flynn examined him, and told him he had only a little bladder trouble, and he said he would give him a bottle of medicine that would cure him in a little while, and he repeated this two or three different times, and he said he was sure that in three weeks' time he would be all right."

This testimony is partially corroborated by that of Mr. Malmstein, who in answer to the question, "Did Doctor Flynn make any statements after he came out (of the house) with Oscar Lindstrom about the medical examination?" replied:

"Doctor Flynn and Mr. Lindstrom talked some about his condition. Doctor Flynn said he could be accepted all right. He said the little trouble you have is not very much, a little bladder trouble, we can get medicine that will cure you in a little while, about three weeks he would be well."

This testimony was emphatically denied by Doctor Flynn, who stated upon oath that in his report of the medical examination he correctly noted Mr. Lindstrom's answers as he gave them. From the sworn statements of Mr. and Mrs. Malmstein the jury might reasonably have inferred that Oscar F. Lindstrom correctly answered every question propounded to him by Doctor Flynn, to whom he carefully detailed all his supposed physical ailments, and that, without his knowledge, the medical examiner changed his answers and supplied others where necessary so as to make it appear that Lindstrom's application was a safe risk.

4. The absence from a written statement of facts constituting a party's cause of action or defense of a material averment will not be supplied by a verdict, but such finding will cure a defective statement in a pleading: *Houghton & Palmer* v. *Beck,* 9 Or. 325; *David* v. *Waters,* 11 Or. 448 (5 Pac. 748); *Weiner* v. *Lee Shing,* 12 Or. 276 (7 Pac. 111); *Bingham* v. *Kern,* 18 Or. 199 (23 Pac. 182); *Kimball Co.* v. *Redfield,* 33 Or. 292 (54 Pac. 216); *Hargett* v. *Beardsley,* 33 Or. 301 (54 Pac. 203); *Foste* v. *Standard Ins. Co.,* 34 Or. 125 (54 Pac. 311); *Hannan* v. *Greenfield,* 36 Or. 97 (58 Pac. 888); *Savage* v. *Savage,* 36 Or. 268 (59 Pac. 461); *Chan Sing*

v. *Portland,* 37 Or. 68 (60 Pac. 718); *Washington etc. Investment Assn.* v. *Stanley,* 38 Or. 319 (63 Pac. 489, 84 Am. St. Rep. 793, 58 L. R. A. 816); *Creecy* v. *Joy,* 40 Or. 28 (66 Pac. 295); *Patterson* v. *Patterson,* 40 Or. 560 (67 Pac. 664); *Philomath* v. *Ingle,* 41 Or. 289 (68 Pac. 803); *Nye* v. *Bill Nye Milling Co.,* 42 Or. 560 (71 Pac. 1043); *Ferguson* v. *Reiger,* 43 Or. 505 (73 Pac. 1040); *Madden* v. *Welch,* 48 Or. 199 (86 Pac. 2); *Johnson* v. *Sheridan Lumber Co.,* 51 Or. 35 (93 Pac. 70); *Hillman* v. *Young,* 64 Or. 73 (127 Pac. 793, 129 Pac. 124).

In *Booth* v. *Moody,* 30 Or. 222, 225 (46 Pac. 884), Mr. Justice BEAN in discussing this subject observes:

"The extent and principle of the rule of aider by verdict is that whenever the complaint contains terms sufficiently general to comprehend a matter so essential and necessary to be proved that, had it not been given in evidence, the jury could not have found the verdict, the want of a statement of such matter in express terms will be cured by the verdict, because evidence of the fact would be the same whether the allegation of the complaint is complete or imperfect. But if a material allegation going to the gist of the action is wholly omitted, it cannot be presumed that any evidence in reference to it was offered or allowed on the trial, and hence the pleading is not aided by the verdict."

5. The bill of exceptions herein contains as a part thereof the entire testimony, and for that reason it is unnecessary to invoke from the verdict a presumption that evidence was received tending to show that, without his knowledge, incorrect answers were noted by the medical examiner upon Mr. Lindstrom's application for insurance. If the defect in the reply wherein the phrase "without collusion" was improperly used for the expression "without knowledge" had been par-

ticularly called to the attention of the trial court, an amendment of the pleading would probably have been allowed; but as the averment referred to was not wholly omitted and testimony in relation thereto was received, the verdict cured such imperfection.

6, 7. Another part of the written notice, served with the demurrer, is to the effect that the allegations of fraud in the reply in respect to the representations imputed to the defendant's agent, whereby the plaintiff's execution of the release is asserted to have been induced, are not set forth with sufficient certainty. The part of the final pleading thus assailed reads:

"That plaintiff was induced to sign said release by reason of false, fraudulent, and unlawful representations made by defendant to her with intent to defraud and deceive her; that defendant represented to the plaintiff that said policy of insurance was void and of no effect because of alleged and pretended false representations which defendant stated to plaintiff had been made to defendant by said Oscar F. Lindstrom as to his condition of health and which thereby caused said policy of insurance to be invalid and not binding upon defendant; that plaintiff relied on said false and fraudulent representations and was induced thereby to sign the pretended release in said answer referred to and to accept a nominal sum therefor under a misapprehension both of law and of fact as to her rights in the premises induced by said false and fraudulent representations so relied upon by her."

It is argued by defendant's counsel that the part of the reply last quoted fails to allege: (1) Whether the representations so imputed to the defendant's agent were made with knowledge of their falsity; (2) that the statements were uttered by him with intent to defraud; and (3) that such narration was relied upon by the plaintiff. In *Bailey* v. *Frazier,* 62 Or. 142, 148 (124

Pac. 643), Mr. Justice BURNETT, discussing this subject, observes:

"It has often been laid down as a rule for pleading fraud in this state that the representations must have been false; that the defendant making them knew they were false; that they were made with the intent to defraud; and that the party seeking to be relieved from the fraud must have relied upon such representations."

In addition to the cases cited as supporting the legal principle thus recognized see also: *McFarland* v. *Carlsbad etc. Sanatorium Co.*, 68 Or. 530 (137 Pac. 209, Ann. Cas. 1915C, 555); *Cobb* v. *Peters*, 68 Or. 14 (136 Pac. 656); *Outcault Advertising Co.* v. *Buell*, 71 Or. 52 (141 Pac. 1020); *Corby* v. *Hull*, 72 Or. 429 (143 Pac. 639); *Ingram* v. *Carlton Lumber Co.*, 77 Or. 633 (152 Pac. 256); *Hyde* v. *Kirkpatrick*, 78 Or. 466 (153 Pac. 41, 153 Pac. 488).

In *Schoellhamer* v. *Rometsch*, 26 Or. 394 (38 Pac. 344), it was ruled that an intent to deceive was not such an essential ingredient of a charge of fraud as to render the complaint omitting that allegation vulnerable to attack after a general demurrer to the initiatory pleading had been overruled. In *McFarland* v. *Carlsbad etc. Sanatorium Co.*, 68 Or. 530 (137 Pac. 209, Ann. Cas. 1915C, 555), it was held that a pleading charging fraud should allege that the representations were false and either known by the person making them to be false, or were made by him recklessly as of his own knowledge without knowing whether or not they were true.

In *Colorado Springs Co.* v. *Wight*, 44 Colo. 179 (96 Pac. 820, 16 Ann. Cas. 644, 647), it was decided that a charge of fraud in a pleading which did not either expressly or impliedly allege that the defendant knew the representations to be false or that he intended them

to be acted upon was demurrable for failure to state a cause of action. In the notes of that case it is said:

"Any allegation which necessarily implies knowledge is sufficient. If the term 'fraudulently' is used in the declaration, complaint, or petition, an allegation that the defendant knew the falsity of the representations may be dispensed with. * * As a matter of pleading, '*fraudulenter* without *sciens*, or *sciens* without *fraudulenter*' is sufficient."

An examination of that part of the reply last hereinbefore quoted will disclose that while the adjective "fraudulent" is used to qualify the name "representations" as there first employed, the adverb "fraudulently" is not used to limit or modify the verb "represented," nor is it charged either that the defendant knew the representations to be false, or that they were made recklessly without knowing whether or not they were true, nor is it averred that the representations were made with intent to deceive. These omissions show that the part of the pleading referred to does not state facts sufficient to constitute a reply; and hence an error was committed in overruling the demurrer interposed on that ground. Other errors are assigned, but believing they will not be repeated the judgment is reversed and a new trial ordered.

REVERSED AND REMANDED.

MR. CHIEF JUSTICE MCBRIDE, MR. JUSTICE BEAN and MR. JUSTICE MCCAMANT concur.

Argued May 23, affirmed June 19, 1917.

MARKS v. FIRST NAT. BANK.

(165 Pac. 673.)

Appeal and Error—Reservation of Grounds for Review.

1. Where plaintiff made no motion for a directed verdict and did not otherwise raise in the lower court the sufficiency of the evidence to support the verdict for defendant, the appellate court will not review the sufficiency thereof.

Appeal and Error—Questions not Raised Below—Review.

2. In the absence of some action in the lower court raising and reserving other questions, review is limited to jurisdictional questions and the sufficiency of the allegations of the complaint; Const. Amend., Article VII. as amended, Section 3 of the Constitution (see Laws 1911, p. 7), not abrogating this statutory rule of appellate procedure.

Banks and Banking—Recovery of Deposit—Assignment.

3. In an action by plaintiff in his own behalf and as assignee of three of his relatives to recover from defendant bank an alleged balance of their deposit, exclusion of check drawn by a relative in favor of plaintiff was proper in view of Section 6022, L. O. L., providing that a check is not an assignment of the deposit to the payee.

Banks and Banking—Deposit—Action—Waiver of Demand.

4. Where defendant bank denied its liability, no demand was necessary in an action to recover an alleged deposit.

[As to pleading demand and refusing to pay in action on bank check, see note in **Ann. Cas.** 1912A, 184.]

From Douglas: GEORGE F. SKIPWORTH, Judge.

Action by H. P. Marks against the First National Bank of Roseburg, wherein a judgment was rendered on the verdict of a jury in favor of defendant, and plaintiff appealed. Affirmed.

Department 1. Statement by MR. JUSTICE MCCAMANT.

This is an action brought by plaintiff on his own behalf and as assignee of three of his relatives, to recover alleged balances of their deposits with the defendant.

The answer denies the material allegations of the complaint and alleges affirmatively that the deposits

claimed had been withdrawn from the bank by T. R. Sheridan, pursuant to authority given him by plaintiff and his assignors; the answer also sets up the defense of account stated.

Issue was joined on the affirmative allegations of the answer and the cause was tried before a jury which found for the defendant. Judgment was entered on this verdict and plaintiff appeals. AFFIRMED.

For appellant there was a brief over the names of *Mr. George Jones* and *Mr. John T. Long,* with an oral argument by *Mr. Jones.*

For respondent there was a brief and an oral argument by *Mr. Oliver P. Coshow.*

MR. JUSTICE MCCAMANT delivered the opinion of the court.

1. There are but three assignments of error. The one most insisted on is the entry of judgment for the defendant, plaintiff insisting that there is no evidence to support the verdict. Plaintiff made no motion for a directed verdict, nor did he otherwise raise in the lower court the question on which he now relies. It has been repeatedly held that the jurisdiction of this court is appellate and its province is to correct the errors of the Circuit Court. If the Circuit Court has committed no error this court cannot reverse its judgment. In the absence of some ruling in the Circuit Court on the question relied on there is nothing on which error can be predicated: *Shmit* v. *Day,* 27 Or. 110, 116 (39 Pac. 870); *United States Mortgage Co.* v. *Marquam,* 41 Or. 391, 405 (69 Pac. 41); *Stoddard Lumber Co.* v. *Oregon-Washington Co., ante,* p. 399 (165 Pac. 363).

2. The only exceptions to this rule are jurisdictional questions and insufficiency of the allegations of the complaint: *Shmit* v. *Day,* 27 Or. 110, 116, 117 (39 Pac. 870).

It has been expressly held that this court will not consider the sufficiency of the evidence to justify the verdict in the absence of some action in the Circuit Court raising and reserving the question: *Shmit* v. *Day,* 27 Or. 110, 116 (39 Pac. 870); *Nunn* v. *Bird,* 36 Or. 515, 520 (59 Pac. 808). A different rule would be unjust to the adverse party and unfair to the trial court. It often happens that the evidence is insufficient in some respect which can be readily supplied. In such case it is within the discretion of the trial court to open up the case and receive the missing evidence. A litigant should not be denied the benefit of such procedure by a rule which permits an appellant to contend in this court for the first time that the evidence of his adversary is insufficient to support a verdict.

It is contended that the above rule has been modified by the amendment to Article VII of the Constitution, adopted in 1910 (Laws 1911, p. 7). Section 3 of the amended article authorizes this court to modify a judgment in certain cases, but it does not abrogate the salutary rule of appellate procedure hereinbefore set out.

3. Error is also assigned on the exclusion by the lower court of a check drawn by E. C. Marks in favor of plaintiff. The check was offered to prove the assignment to plaintiff of the cause of action alleged in the second count of the complaint. A check is not an assignment of the deposit to the payee: Section 6022, L. O. L.; *United States National Bank* v. *First Trust etc. Bank,* 60 Or. 266, 272 (119 Pac. 343). The evidence offered was therefore immaterial and was properly excluded.

4. Plaintiff testified on cross-examination that he made several demands on Sheridan for his money. On redirect he was asked: "Were you making demand upon Mr. Sheridan, or were you dealing with Mr. Sheridan as an individual or as president of the bank?" On objection by the defendant the court excluded the testimony sought to be elicited. We think that the ruling was right. Where, as in this case, a bank disputes its liability to a depositor, no demand is necessary to support the depositor's action: *First National Bank* v. *Peck,* 180 Ind. 649, 659 (103 N. E. 643); *Pratt* v. *Union National Bank,* 79 N. J. L. 117, 120 (75 Atl. 313); *Holden* v. *Farmers' etc. National Bank,* 77 N. H. 535, 538 (93 Atl. 1040, L. R. A. 1915F, 309); *Donijanovic* v. *Hartman,* 169 Mo. App. 204, 211 (152 S. W. 424). It appeared that the demands made on Mr. Sheridan were by letter and plaintiff testified that the letters were addressed simply to T. R. Sheridan. What was in plaintiff's mind as to the capacity in which he addressed Mr. Sheridan was clearly not evidence. Furthermore, it appeared that plaintiff demanded his alleged deposit from S. A. Sanford, cashier of the defendant. This was sufficient if a demand had been necessary. We find no error and the judgment is affirmed.

AFFIRMED.

MR. CHIEF JUSTICE MCBRIDE, MR. JUSTICE BEAN and MR. JUSTICE HARRIS concur.

Submitted on brief June 7, affirmed June 19, 1917.

HOLDEN *v.* A. F. COATS LUMBER CO.

(165 Pac. 674.)

Waters and Watercourses—Flooding Land—Evidence—Admissibility.

1. In an action for damages caused by changing the channel of a river by digging a ditch across the open end of a horseshoe bend and flooding plaintiffs' land, evidence that the stockholders of both the defendant corporations were identical and that their subscriptions in each corporation were in exact proportion, and that the secretary of both corporations was identical, and that the manager of the defendant lumber corporation was a director of the defendant boom corporation, and was active in negotiations whereby it was sought to obtain plaintiffs' consent to the digging of the ditch, and that the foreman of the actual work of digging the ditch was an employee of the lumber corporation and received his pay from it, and that the boom corporation derived the funds with which to carry on its work from the heaviest stockholder in the lumber corporation and from the lumber corporation, without other evidence of the debts than promissory notes and open account, and that the boom corporation had not handled any logs other than those belonging to the lumber corporation, was admissible as tending to prove the liability of the lumber corporation for acts of the boom corporation in digging the ditch.

[As to the liability of well owner for injury caused by water flowing on to adjoining land, see note in Ann Cas. 1914D, 563.]

Principal and Agent—Existence of Agency—Jury Question.

2. Evidence *held* to warrant submission to the jury of the question whether defendant boom corporation which dug the ditch was the agent of the defendant lumber corporation in doing so.

Trial—Reception of Evidence—Discretion of Court.

3. The court did not abuse its discretion in permitting the plaintiffs to testify upon rebuttal in regard to the nature and extent of the damage done by the high water, where it appears that this evidence goes to meet unexpected evidence offered by defendant.

From Tillamook: GEORGE R. BAGLEY, Judge.

This is an appeal from a judgment rendered in favor of plaintiffs, A. E. Holden and Ethel Holden, husband and wife, and against the defendants, A. F. Coats Lumber Company, a corporation, and the Coats Driving and Boom Company, a corporation. Affirmed.

In Banc. Statement by MR. JUSTICE BENSON.

Plaintiffs are the owners of 30 acres of farming land in Tillamook County through which the Tillamook

River flows, and in its course through the land it makes what may be called a horseshoe bend. The substance of the complaint is that the two defendant corporations wrongfully and without plaintiffs' consent entered upon their land and changed the channel of the river by digging a ditch across the open end of the horseshoe bend and dumping large quantities of earth and rock into the bed of the stream, thereby flooding their land and washing away the soil to their damage in the sum of $2,500.

The A. F. Coats Lumber Company answering separately, denied the allegations of the complaint.

The Coats Driving and Boom Company in its answer admits the digging of the ditch but denies that it acted wrongfully or without the consent of the plaintiffs, and denies that injury resulted therefrom. It then alleges that the ditch was dug with the consent and approval of plaintiffs and was, in fact, an actual benefit and protection to plaintiffs' land; that the ditch was dug in a careful manner, of sufficient capacity to provide for carrying the ordinary flow of the river, but that during the winter seasons of 1915 and 1916, an unusual and extraordinary flow of water occurred in the river, and extraordinary storms and rainfall ensued raising the waters of the stream to an unusual height, and that if plaintiffs' land was flooded and damaged it was not because of any act of defendants, but because of the unusual floods.

A reply being filed a trial was had resulting in a verdict and judgment for plaintiffs in the sum of $585, from which defendants appeal.

Submitted on briefs under the proviso of Supreme Court Rule 18: 56 Or. 622 (117 Pac. xi).

AFFIRMED.

For appellants there was a brief over the names of *Messrs. Veazie, McCourt & Veazie* and *Mr. H. T. Botts.*

For respondents there was a brief over the name of *Mr. Sidney S. Johnson.*

MR. JUSTICE BENSON delivered the opinion of the court.

There is a large number of assignments of error but they may be logically discussed in two groups: Objections to the admissibility of certain evidence; and objections to certain instructions to the jury based upon such evidence.

1, 2. The theory upon which plaintiffs presented their case was that the Boom Company was the creature of the Lumber Company and simply an instrument in its hands, whereby it performed some of its desired ends. It is conceded that the actual work which resulted in the alleged injury was performed by the Boom Company. Upon the other hand the defendants insisted that the Lumber Company could not in any event be held liable for a tort of the other corporation. In support of their contention the plaintiffs called as a witness one B. W. Miller who testified that he was secretary of both corporations; that during the year 1915, "the Coats Driving and Boom Company was a logging corporation putting in logs to supply the A. F. Coats Lumber Company's mill in Tillamook." This witness also used the following language:

"The A. F. Coats Lumber Company contemplated that they would have to have logs to run their mill, and in order to do that they bought a certain tract of timber at the head of Buley Creek, and it was deemed the most practical way to get them out to have a com-

pany that would attend to that part of the work of driving and booming the logs."

The articles of incorporation of both companies were offered in evidence from which it appears that the Lumber Company had a capitalization of fifty thousand dollars and the Boom Company a capital stock of two thousand dollars. The minutes of the first meetings of both organizations were introduced, from which it appears that the stockholders of both were identical, and that their subscriptions of stock in the smaller company were in exact proportion to their holdings in the larger. It further appears from the evidence that O. A. Shultz, manager of the Lumber Company, and a director of the Boom Company, was active in the negotiations whereby it was sought to obtain plaintiff's consent to the digging of the ditch; that one Peter Jackson, a foreman in the actual work of digging the ditch, was an employee of the Lumber Company and received his pay from it; that the Boom Company derived the funds with which to carry on its work, including some miles of logging railroad and equipment, from A. F. Coats, the heaviest stockholder in the Lumber Company, and from the Lumber Company itself, without other evidence of debt than promissory notes and open account; and that the Boom Company had not handled any logs other than those belonging to the Lumber Company. All of this evidence was admitted over the strenuous objection that none of it tended to prove any liability upon the part of the Lumber Company. With this contention we cannot agree. It is probably true that no one item thereof is sufficient evidence upon which to base a verdict, but each detail certainly constitutes a circumstance throwing light upon the situation and when

combined they make a sufficient record to justify submission of the question to the jury.

The objections to the instructions, with a single exception, are predicated upon the admissibility of the evidence already discussed, so we need not consider them further.

One instruction, however, is based upon the theory that there was evidence that the earth and rock were dumped into the river by one or both of the defendants, whereas the defendants insist that there is a failure of proof in this respect. An examination of the bill of exceptions discloses abundant evidence that it was done by the Boom Company in the progress of its work and therefore the instruction was not erroneous.

3. It is also urged that the court erred in permitting the plaintiff, A. E. Holden, to testify upon rebuttal in regard to the nature and extent of the damage done by the high water, but an examination of the record discloses that this evidence goes to meet unexpected evidence offered by defendants and in our judgment the court did not abuse its discretion in permitting it.

We find no error in the record and the judgment is affirmed. AFFIRMED.

Argued April 24, affirmed May 15, rehearing denied June 26, 1917.

MARMENI *v.* BELLARTS.*

(164 Pac. 955; 165 Pac. 1170.)

Vendor and Purchaser—Rescission—Sufficiency of Evidence.

1. Testimony of plaintiff purchaser and another that the vendor misrepresented a boundary line does not warrant a rescission, where the abstract, deeds and maps correctly describing the property were examined by the plaintiff's agents, especially where plaintiff seeks to rescind after the property has decreased in value.

[As to effect of failure to read contract or carelessness in executing it or right to rescind for fraud, see note in 32 **Am. St. Rep.** 384–387.]

From Multnomah: HARRY H. BELT, Judge.

Suit by Eugene Marmeni against Henry J. Bellarts to rescind a sale of certain real property and praying for other equitable relief. The defendant obtained the decree in the lower court and plaintiff appeals. Affirmed.

Department 1. Statement by MR. JUSTICE HARRIS.

This is a suit to rescind a sale of real property, to cancel a mortgage and note and to recover the payments made on the purchase price. H. J. Bellarts owned land in the city of Portland upon which was located a large ten-room dwelling-house. The premises are described thus: Lot 6 in Block 4 in Beacon Heights and also a strip 30 feet in width along the east end of lot 6. Bellarts conveyed by warranty deed lot 6 and the 30-foot strip along the east end of the lot "all according to the duly recorded map and plat thereof as the same appears of record in said Multnomah County, Oregon," to Eugene Marmeni on

*On right to rely upon representations made to effect contract as a basis for a charge of fraud, see note in 37 **L. R. A.** 610.

On right of purchaser of land to rely on representation of seller as to boundaries, see note in 14 **L. R. A. (N. S.)** 1210. REPORTER.

March 15, 1912, for the agreed price of $3,750, of which $600 was paid in cash, and Marmeni paid the remainder of the purchase price by giving his promissory note for $3,150, and a mortgage on the realty as security. The principal sum of the note with interest was made payable in monthly installments of not less than $25 commencing with April 15, 1912. Marmeni at once took possession, rented the premises and received the rents. He paid the monthly installments on the note until and including the month of June in 1914. In August, 1914, Marmeni tendered a deed together with the rentals collected by him and demanded that Bellarts cancel the note and mortgage and return the payments made by him. Upon the refusal of Bellarts to comply with the demand, Marmeni commenced this suit to rescind the sale, on the ground that he had been induced to purchase by misrepresentations concerning the location of the boundaries of the premises. The defendant denied the charge of fraud, alleged an affirmative defense and also prayed for a foreclosure of the mortgage. The decree of the trial court was for the defendant and the plaintiffs appealed.

AFFIRMED.

For appellant there was a brief and an oral argument by *Mr. Henry M. Kimball.*

For respondent there was a brief over the name of *Messrs. Malarkey, Seabrook & Dibble,* with an oral argument by *Mr. Ephraim B. Seabrook.*

MR. JUSTICE HARRIS delivered the opinion of the court.

1. We can have a better understanding of the situation if we first describe the premises. Bellarts owned lot 6 together with a 30-foot strip on the east end of the

lot. Lot 6 faces Ninth Street on the west with a frontage of 45 feet and it is 51.8 feet in depth. Adding the 30-foot strip to lot 6 it will be seen that the premises owned by Bellarts were 45 feet in width by 81.8 feet in length. Adjoining the east end of the premises owned by Bellarts is a second 30-foot strip which has been made prominent by this litigation. For convenience the first 30-foot strip or in other words the one adjoining lot 6 will be referred to as A and the other 30-foot strip will be designated as B. An iron fence extended across the front end of lot 6. A board fence extended along the south side of lot 6, A and B and the same kind of a fence was maintained along the north line of lot 6, A and B; and a similar fence was constructed along the east line of B. In brief, if we consider lot 6, A and B as a single tract they were inclosed with an iron fence on the west, and with a board fence along the north and south sides and on the east end. While the evidence is conflicting, it fairly appears that a fence made of wire netting was maintained on the line between A and B. The dwelling-house covers nearly all of lot 6 and A, as it is only about eight or ten feet from the front of the building to the street and it is about the same distance from the rear of the house to the east line of A.

The persons to be kept in mind are H. J. Bellarts, the vendor, Eugene Marmeni, the vendee, Louis Deluchi, a real estate agent, and M. G. Montrezza, who was admitted to practice as an attorney at law in June, 1912.

Marmeni had "a little money" in 1912 and as he expressed it "I thought I better buy a little piece of property before I spend the money." Montrezza was advised by his client Marmeni that the latter "wanted to purchase a house somewhere" and the former then

asked Deluchi "if he had anything to submit." Deluchi afterwards took Montrezza and Marmeni and showed them the property on March 12, 1912. Deluchi had previously seen Bellarts and arranged for a broker's commission in the event he found a purchaser for the property. Deluchi avers that Bellarts told him that his property included all within the board fence; but Bellarts denies this and says that he did not tell Deluchi anything about the dimensions except that he owned lot 6 and a 30-foot strip. Marmeni testified that when looking over the premises Deluchi told him that the property he was to buy included all the land within the board fence and Deluchi testified to the same effect. After inspecting the property Marmeni, Deluchi and Montrezza immediately went to Bellarts, and after some conversation Marmeni agreed to purchase the property, paid Bellarts $40 to bind the bargain and took a receipt which recited the payment of the deposit and that Marmeni was to have an opportunity to examine the abstract. The receipt was not produced; but, Montrezza testified that he prepared the receipt; and he also stated that because of the fact that he had not yet been admitted to practice as an attorney at law he was especially careful to see that it contained a correct description of the property. Bellarts produced and delivered an abstract together with three deeds, one from Sarah Calvet to Otto Myhre, one from the guardian of the estate of Myhre to Bellarts, and one from Myhre to Bellarts. Not wishing to assume the responsibility of examining the title, Montrezza delivered the abstract to Samuel Olson, an attorney, who examined the abstract and gave a written opinion on March 15, 1912, to the effect that Bellarts owned the property in fee simple. The sale was closed on March 15, 1912, when Marmeni,

Montrezza, Deluchi and Bellarts went to the office of J. A. Strowbridge for the purpose of signing and passing the necessary papers. Marmeni paid Bellarts $560 which with the $40 deposit made a total payment of $600. Bellarts delivered a warranty deed to Marmeni and the latter delivered his note and mortgage to the former. Before the deed and mortgage were delivered Montrezza examined them for the purpose of ascertaining whether they were properly drawn and more especially to see whether the description corresponded with the description in the abstract.

The description in the deed to Marmeni is in exact conformity with the description found in the abstract and three deeds which were delivered with it and also with the description found in the written opinion by Olson concerning the title. The first page of the abstract reads thus: "Lot 6 Block 4, Beacon Heights, also a strip of land 30 feet wide along the east side of said lot 6." The second page contains a map of lot 6 and the other lots in the block facing Ninth Street. The map plainly shows that the width of lot 6 is 45 feet and that its length is 51.8 feet.

While the liability of Bellarts does not necessarily depend upon whether he showed the premises to Deluchi or upon whether he told Deluchi that he owned all the property within the board fence, nevertheless the testimony concerning those matters may be helpful in determining the credibility of the witnesses. The testimony of Deluchi concerning a woman cleaning the house, together with what Mrs. Bellarts says about cleaning the house rather indicates that Bellarts never accompanied Deluchi to the premises. Bellarts knew that he owned lot 6 and A and he also knew that the deeds under which he claimed title did not embrace B. Bellarts had the abstract and it is to be presumed

that he knew that the map showed that lot 6 was 51.8 feet long and that he therefore knew that 81.8 feet was the depth of his property. Being aware of all of this, it would be quite extraordinary for Bellarts to represent that he owned all within the board fence and then deliver the abstract and three deeds for inspection knowing that the abstract plainly showed the dimensions of the premises owned by him. One cannot read the transcript without being impressed with the idea that Deluchi is decidedly friendly to Marmeni and yet it is a most significant circumstance that Deluchi admitted that when they inspected the premises the board fence along the east end of B appeared to be more than 100 feet from the street. When a witness for the plaintiff and asked: "How far did it look from the front fence to the back fence?" he answered: "Fully over a hundred feet." And in response to the next question: "Anybody could see that, the same as you?" he answered "Sure." It will be recalled that Montrezza prepared the receipt for the $40 deposit and that he was careful to insert the description in the receipt. Montrezza knew what Marmeni was buying and so did Olson. Both Montrezza and Olson were agents for Marmeni and their knowledge was his knowledge. Olson knew the length of the property to be purchased because the map in the abstract told him the dimensions and it is fair to assume that Montrezza likewise knew the depth and width of lot 6 and A.

The subsequent conduct of Marmeni throws additional light upon the contention he now makes. On July 22 or 23, 1913, Deluchi received a letter from J. Landigan giving notice that the latter held a warranty deed to B and complaining because B was fenced in. Deluchi immediately notified Marmeni of the re-

ceipt of this letter and the latter in turn consulted with Montrezza. It is true that Marmeni excuses his subsequent conduct by the claim that his suspicions were quieted and his mind lulled to rest by certain representations made by Bellarts, but it is also true that this claim of Marmeni is flatly denied by Bellarts; and, moreover, Marmeni paid the taxes on July 24, 1913, after being told of the Landigan letter received by Deluchi. Marmeni continued to pay the monthly installments on the note and he collected the rents until finally on June 24 or 25, 1914, Marmeni received from Landigan a letter dated June 3, 1914, notifying Marmeni "to take down your fence and improvements on my ground east of 614 East 9th." Soon after the receipt of this letter Marmeni consulted an attorney and subsequently demanded that Bellarts rescind the sale.

It would not be difficult to imagine a variety of situations where a vendee would be entitled to rely upon representations by the vendor or his agent concerning the location of a boundary line; and because of such reliance, upon ascertaining the falsity of the representations, he could rescind the sale. However, at the very outset of the present investigation we find the contention of plaintiff clouded with suspicion. In 1912 property values were elevated. When Marmeni purchased there was talk of the construction of a bridge which would have materially benefited the property, but at the fall election the proposal to build the bridge was defeated. With the year 1914 came financial depression and marked reductions in realty values. The property was amply worth the price in 1912 but it was not worth the price in 1914.

If Marmeni was deceived at all it was only because of what Deluchi claims he told him about the board

fence. Marmeni insists that there was no wire fence on the line between A and B, although he concedes that a wire fence ran across one corner. It will be recalled that Montrezza prepared the receipt that was given by Bellarts to Marmeni when the $40 deposit was made. According to the testimony of the plaintiff himself "Mr. Montrezza drew that up, before we went to Mr. Bellarts." Having prepared the receipt before they saw Bellarts it is obvious that Montrezza had gone to the trouble of ascertaining the description of the land owned by Bellarts before they inspected the premises, because it is conceded that Montrezza, Marmeni and Deluchi went to Bellarts immediately upon completing their examination of the property. Montrezza explained that he took unusual care to obtain the correct description because he had not yet been admitted to practice and naturally he wished to avoid any possibility of making any mistake. Deluchi tells us that it appeared to be more than a hundred feet from the front fence to the board fence on the east end of B and that "anybody could see that." The map, abstract and deeds all showed that the land owned by Bellarts was 81.8 feet and not 111.8 in depth. Olson examined the abstract and presumably ascertained the depth of the property owned by Bellarts. Marmeni relied upon Montrezza not only for legal but also for business advice. Montrezza was paid by Marmeni "for looking over the premises"; and Montrezza advised Marmeni to take the deed because the former thought that the latter "would be getting what he bought." In contemplation of law Marmeni knew what his agents Olson and Montrezza knew and their knowledge that the property owned by Bellarts was only 81.8 feet in length must be imputed to him. Marmeni could not remain blind to

what he saw with his own eyes. His witness Deluchi says that anybody could see that the board fence on the east end of B was more than 100 feet from the front of lot 6 and consequently Marmeni is in no position to claim that he was induced to buy because of a misrepresentation of a boundary line, when "anybody could see" that the line claimed to have been shown would give the property a depth of more than a hundred feet and he must have known that the land deeded to him was only 81.8 feet in depth: *Waymire* v. *Shipley,* 52 Or. 464, 473 (97 Pac. 807); *Southern Development Co.* v. *Silva,* 125 U. S. 247 (31 L. Ed. 678, 8 Sup. Ct. 881); *Shappirio* v. *Goldberg,* 192 U. S. 232 (48 L. Ed. 419, 24 Sup. Ct. 259); *New Orleans etc. Min. Co.* v. *Musgrove,* 90 Ala. 428 (7 South. 747); 2 Pom. Eq. Jur. (3d ed.), 892. If a vendee knows that he is buying a strip of land 81.8 feet long he cannot successfully claim that he has been defrauded if he is shown a line which he knows would make the strip more than 100 feet long. The evidence does not warrant a rescission and the decree is therefore affirmed.

AFFIRMED.

MR. CHIEF JUSTICE MCBRIDE, MR. JUSTICE BENSON and MR. JUSTICE BURNETT concur.

Affirmed May 15, rehearing denied June 26, 1917.

ON PETITION FOR REHEARING.

(165 Pac. 1170.)

On petition for rehearing. Rehearing denied.

Mr. Henry M. Kimball, for the petition.

Messrs. Malarkey, Seabrook & Dibble, contra.

Department 1. MR. JUSTICE BENSON delivered the opinion of the court.

In support of his motion for rehearing, counsel for appellant urges that the former opinion herein must have been hasty and ill-considered by reason of the fact that the opinion discusses certain allegations of the affirmative answer in regard to which there is no evidence in the record. By some inadvertence, it is true that the writer of the former opinion did refer to such portion of the answer upon the theory that it was not denied in the reply, and this is error. However, we have again read the testimony line by line, considering every suggestion made by counsel, and are unable to discover any good reason for changing the conclusion reached in the former opinion. The rehearing is therefore denied. REHEARING DENIED.

MR. CHIEF JUSTICE MCBRIDE and MR. JUSTICE BURNETT concur.

MR. JUSTICE HARRIS delivered the following concurring opinion:

1. The plaintiff earnestly insists that the conclusions expressed in the original opinion are not sustained by

the evidence and that a rehearing should be granted. In the original opinion it is stated that:

"In 1912 property values were elevated. When Marmeni purchased there was talk of the construction of a bridge which would have materially benefited the property, but at the fall election the proposal to build the bridge was defeated. With the year 1914 came financial depression and marked reductions in realty values. The property was amply worth the price in 1912, but it was not worth the price in 1914."

When checking over the pleadings, as printed in the abstract of record, paragraphs XI and XII of the answer and cross-complaint were treated as admitted by reason of the supposed failure of the plaintiff to deny them, but a re-examination of the abstract discloses that those two paragraphs were denied; and hence the quoted statements are not fully justified by the record, although the subject of the bridge and the decrease in realty values received more than passing notice at the time of the hearing. While there was no evidence concerning the bridge, for the reason that the court sustained an objection to an offer of the defendant to show the facts regarding the bridge, nevertheless, there was enough evidence to warrant the inference that the property was worth the purchase price in 1912. Deluchi, who was "in the real estate business," said that at first Bellarts asked $4,000 for the property, but he consented to sell for $3,750. Deluchi considered the selling price was the fair value of the land, for in the language of his testimony: "I thought that was a fair purchase price, I told Mr. Bellarts, you know a real estate man tries to compromise, that is, wants to do the fair thing for both." However, it is not essential, and perhaps not even important, to know the difference between the values in 1912 and in

1914, although evidence of a material reduction in value, if competent at all, might tend to throw light upon the motives actuating Marmeni. In some jurisdictions the courts have taken judicial notice of a general depression in values of real estate: 7 Ency. of Ev. 934; but we shall assume, without deciding, that by reason of the language in Section 729, L. O. L., courts cannot take judicial notice of a general financial depression; and, therefore, not only what was said in the original opinion about the bridge but also what was said concerning the value of the premises in 1914, as well as all of the discussion about the bridge and values at the time of the hearing, will be laid out of the case.

Deluchi received a letter from J. Landigan on July 22 or 23, 1913. Deluchi immediately informed Marmeni of the letter and while the original opinion is not accurate in declaring that Marmeni "consulted with Montrezza" about this letter, it is nevertheless accurate to say that Montrezza was notified of the claim made in the Landigan letter, for according to the testimony of Montrezza "Mr. Deluchi brought it to my attention himself."

The petition for a rehearing questions the correctness of the statements made in the original opinion about the preparation of the $40 receipt. Montrezza had not yet been admitted to practice as an attorney at law when Marmeni purchased the property, and, on that account, Montrezza was unusually painstaking. He explained that he was very careful when examining the papers in Strowbridge's office and he said that he was likewise careful in the preparation of the receipt, for he testified thus:

"I remember being naturally, you may say, waiting to be an attorney, and as an attorney to be at the time, I was careful what I was doing, as I had quite a large Italian practice at the time, before I was admitted."

The plaintiff urges that Montrezza inserted the description of the property in the receipt at the time of the payment of the $40. The description may have been written in the receipt at the time Bellarts signed it; and, yet, the fact remains that Marmeni testified that "Mr. Montrezza drew that up, before we went to Mr. Bellarts." No witness testified that the description was inserted after Marmeni, Deluchi and Montrezza visited the premises. The receipt was not produced; but the evidence overwhelmingly shows that the receipt mentioned the premises. Montrezza testified thus:

"I don't remember whether I had the number of the lot or block, or the dimensions, or location of the property."

Whether Montrezza obtained the description or dimensions of the property before or at the time Bellarts signed the receipt is not material because the ultimate fact is that he had "something connected with the dimensions, or location of the property." While Montrezza testified that "Mr. Marmeni paid me something for looking over the premises," and Marmeni swore that "I didn't pay him anything"; nevertheless, Marmeni is confronted with the indisputable facts that Montrezza prepared the receipt, was present when Bellarts signed it, was also present when the final papers were signed and passed, and was acting for and in behalf of Marmeni. Montrezza knew what property was being sold because he wrote the receipt. Montrezza was the agent of Marmeni and his knowledge was the knowledge of Marmeni.

When a witness for the plaintiff, Deluchi said that while he did not measure the distance from "the front to the back, between the two fences" he was "positive it was over a hundred"; but that it appeared "fully

over a hundred feet" and that "anybody could see that." In his printed brief Marmeni says that he "examined the premises and observed the boundaries but did not appreciate the distance." If Marmeni is to be judged by his own evidence it will become reasonably certain that he has at least a fair idea of measurements and distances. When asked about his estimate of the dimensions of the house and after protesting that "I am a poor judge about that" he said that the house "must be more than forty-five by fifty; must be about forty-five by sixty, something like that; I am just guessing."

If Bellarts is liable at all it is because of what Marmeni says that Deluchi told him. It is true that Marmeni testified that Bellarts told him when the receipt was signed that "everything Deluchi showed me inside the fence was all mine," but it is also true that Bellarts denied this, and, although present on the occasion mentioned, neither Montrezza nor Deluchi undertook to corroborate Marmeni.

While Bellarts is responsible for whatever Deluchi said, by the same token Marmeni is chargeable with whatever he himself knew and also with whatever Montrezza learned when acting as his agent. When speaking of the knowledge with which Marmeni was chargeable, the circuit judge who saw the witnesses and heard them testify remarked that

"a man who was so diligent as Mr. Marmeni in accumulating money in his business with which to buy property, it seems to me he would ascertain how many feet there were in the lot. I believe that Marmeni knew the dimensions of that lot after the examination of the abstract, because an attorney could not help by the reading of the abstract know that the lot was 45 feet frontage and 81.8 feet deep, that is the property which he was buying."

The evidence shows that Marmeni knew or must be deemed to have known that it was more than 100 feet from the front fence to the rear fence which, he says, was pointed out to him as the boundary of the premises; he knew or must be deemed to have known that the property described in the receipt and deed delivered to him and in the mortgage signed by him was only 81.8 feet in length; and consequently he is in no position to claim that he was defrauded, especially after the long delay which followed the Landigan letter in 1913. The transcript of the testimony was read twice before the preparation of the original opinion and a third reading has only confirmed the conclusion there expressed. A petition for a rehearing should be denied.

Submitted on briefs June 16, reversed and dismissed June 26, 1917.

BUSTER *v.* MARION COUNTY.

(165 Pac. 1168.)

Infants—Mother's Pension—Dependency of Children.

1. Under Mothers' Pension Act, Laws 1913, page 75, Section 4, providing that the act shall not apply to a child having property of its own sufficient for its support, and Section 1346, L. O. L., providing for sale of minors' real estate when necessary for their support, where children were left by their father 80 acres of uncultivated land subject to their mother's dower interest, she was not entitled to benefits of the Pension Act until such land had been disposed of according to law and the proceeds exhausted in caring for the children.

[As to right to sell infant's real estate for education or maintenance when parents are able to provide for him, see note in **Ann. Cas.** 1914B, 276.]

From Marion: WILLIAM GALLOWAY, Judge.

Application of Grace E. Buster for the support of two minor children under the Mother's Pension Act. From an allowance of $17.50 per month made by the

Circuit Court, the defendant Marion County appealed. Reversed and application dismissed.

In Banc. Statement by MR. JUSTICE BENSON.

The Juvenile Court of Marion County made an order allowing plaintiff a pension of ten dollars a month for the support of herself and two children, both under the age of sixteen years, under the provisions of what is known as the Mothers' Pension Act, Chapter 42, Laws 1913, as amended by Chapter 90, Laws 1915. From this order plaintiff appealed to the Circuit Court, contending that the Juvenile Court erred in finding that the children were not wholly dependent upon the labor of the mother for their support by reason of the fact that she owned a half-acre tract of land about three miles east of Salem with a dwelling-house and other buildings thereon and, in addition to a vegetable garden, kept chickens. Upon a trial in the Circuit Court, a decree was entered allowing plaintiff a pension of $17.50 per month, dating from May 4, 1916, the date of her first application, and the county appeals.

Submitted on briefs under the proviso of Supreme Court Rule 18: 56 Or. 622 (117 Pac. xi).

REVERSED AND DISMISSED.

For appellant there was a brief over the names of *Mr. Max Gehlhar,* District Attorney, and *Mr. James G. Heltzel,* Deputy District Attorney.

For respondent there was a brief over the names of *Mr. Frank A. Turner* and *Mr. Rex A. Turner.*

MR. JUSTICE BENSON delivered the opinion of the court.

1. From the application filed by the mother, it appears that her husband died January 7, 1914, leaving an

estate consisting of $1,288 in money derived from life insurance, and eighty acres of uncultivated land in Lincoln County; that $800 of this was expended by the widow in paying her husband's debts, and with the remainder she purchased the one-half acre upon which she resides. From the testimony given upon the trial in the Circuit Court, it appears that the eighty-acre tract was encumbered with a mortgage of $250 for borrowed money which was one of the debts paid by the widow, the land being now free from liens. This tract of land is the property of the children subject to the mother's dower interest. No effort has been made to convert this land into money. Section 4 of the statute involved reads thus:

"The provisions of this act shall not apply to any child which has property of its own sufficient for its support, nor to any child which does not reside with its mother": Chap. 42, Laws 1913.

Section 1346, L. O. L., provides for the sale of real estate belonging to minors when necessary for their support. The record does not disclose the market value of the land owned by the children in this case; but, until it is disposed of according to law and the proceeds exhausted in caring for the children, the plaintiff is not entitled to the benefits of the Pension Act. The decree of the Circuit Court must therefore be reversed and one entered here dismissing the application. REVERSED AND DISMISSED.

MR. JUSTICE BURNETT and MR. JUSTICE MOORE took no part in the consideration of this case.

Argued June 6, affirmed June 26, 1917.

SHANE *v.* GORDON.

(165 Pac. 1167.)

Mortgages—Agreement to Surrender Mortgage and Note—Sufficiency of Evidence.

1. In suit to cancel a note and mortgage, evidence *held* sufficient to sustain finding that defendant agreed to surrender the note and mortgage.

From Washington: GEORGE R. BAGLEY, Judge.

Department 1. Statement by MR. JUSTICE HARRIS.

This is a suit to cancel a note and mortgage. J. D. Gordon owned 16 acres of land in Yamhill County; and on May 20, 1912, he agreed in writing to sell the premises to John G. Shane, F. A. Shane and M. Z. Shane for $5,028. The contract recites that $1,000 was paid at the time of the execution of the writing, and that the remainder of the purchase price was payable on or before three years after May 20, 1912, with interest at the rate of 6 per cent per annum. No cash was paid to Gordon, but on the day of the execution of the contract John G Shane and Johanna C. Shane gave their note for $1,000, payable on or before three years after date, with interest at 6 per cent per annum, to the order of J. D. Gordon. The note was secured by a mortgage executed by Johanna C. Shane on 79 acres of land owned by her in Washington County. Johanna C. Shane was not interested in the Yamhill County land and she only signed the note and gave the mortgage to accommodate her brother John G. Shane and her sisters F. A. Shane and M. Z. Shane. John G. Shane and M. Z. Shane took possession of the Yamhill County land soon after May 20, 1912, and resided there until about June 1, 1914, when they vacated the premises.

The Shanes paid all the interest due on May 20, 1913, amounting to $301.68, and on May 20, 1914, interest on the note, amounting to $60, was paid, but no other payments were made. Gordon entered into possession of the property immediately after it was vacated by the Shanes. Within sixty days from June 1, 1914, Gordon exchanged the 16 acres in Yamhill County for land in Lane County. Gordon says that the Lane County land was valued at $7,500, but it was encumbered with a $2,500 mortgage; and, therefore, if the valuation placed upon the Lane County land is taken as the standard, the Yamhill County property was worth $5,000 in 1914, as well as in 1912, when the Shanes contracted to purchase.

The plaintiff claims that her brother and sisters vacated the property and relinquished all their rights to it with an agreement on the part of Gordon that he would surrender the note and mortgage whenever he sold or disposed of the property. The defendant denies that he agreed to surrender the note and mortgage. Gordon refused to cancel the note and mortgage and the plaintiff then commenced this suit. The trial court decreed the cancellation of the note and mortgage and the defendant appealed.

AFFIRMED.

For appellant there was a brief over the name of *Messrs. Bronaugh & Bronaugh,* with an oral argument by *Mr. Earl C. Bronaugh.*

For respondent there was a brief and an oral argument by *Mr. William G. Hare.*

MR. JUSTICE HARRIS delivered the opinion of the court.

1. The only question involved in this suit is whether Gordon agreed to surrender the note and mortgage.

The evidence for the defendant contradicts the evidence for the plaintiff, and it is impossible to harmonize the version of one party with that of the other. If the occurrences were as narrated by John G. Shane and one of his sisters, the conclusion is inevitable that Gordon agreed to surrender the note and mortgage; but, on the other hand, the plaintiff must fail if John G. Shane did no more than merely to tell Gordon that

"he had just been to the doctor and the doctor advised him he would have to give up and he was not able to farm any more, and he would have to give up and he said consequently he would have to give up the place, he couldn't work it."

John G. Shane was in Gordon's office on the morning of May 20, 1914. Gordon says that John G. Shane was in the office twice that morning and he is corroborated by a witness who was present on both occasions. Gordon says that John G. Shane did not visit his office again that day, while Shane says that he met Gordon in his office that evening, about 7:30 o'clock, and at that time they agreed that the Shanes would surrender the property and that Gordon would surrender the note and mortgage. If the agreement was made at all it was made in the evening when no persons were present in the office except Gordon and John G. Shane and while a sister of the latter was outside sitting in a buggy. The version of one party cannot be harmonized with the other. The trial judge had the advantage of seeing and hearing the witnesses and he concluded that the preponderance of the evidence was with the plaintiff. S. W. Childers testified that Gordon's reputation for veracity was bad and another witness swore that some people said Gordon's reputation was bad. Eliminating the testimony of Childers, because he was unfriendly to Gordon, and ignoring what was said by

the other witness mentioned, there is nevertheless testimony given by J. D. Crater impeaching the veracity of the defendant. The subsequent conduct of John G. Shane and his sisters rather indicates that they understood, at least, that Gordon had agreed to surrender the note and mortgage. Presumably the land was worth $5,000 because the Shanes agreed to pay that sum for it, and Gordon subsequently traded it for that valuation; and if the land was worth $5,000 it is reasonable to suppose that Shane would have attempted to save all or a part of the note and mortgage rather than make no attempt whatever, especially when he could have compelled Gordon to foreclose the contract. Notwithstanding the fact that Gordon was engaged in the real estate business, he would not give an estimate of the rental value of the land; and it is fair to assume that the interest received by him was in excess of a reasonable rental value. A complete review of all the evidence would serve no good purpose; and it is sufficient to say that the entire record has been carefully examined by more than a single member of this court, with the result that, while the testimony is conflicting, nevertheless following the rule in *Scott* v. *Hubbard,* 67 Or. 498, 505 (136 Pac. 653), we take it as true that the evidence preponderates in favor of the plaintiff, since the trial court found for the plaintiff: *Goff* v. *Kelsey,* 78 Or. 337, 348 (153 Pac. 103). The decree is affirmed.

AFFIRMED.

MR. CHIEF JUSTICE MCBRIDE, MR. JUSTICE BENSON and MR. JUSTICE BURNETT concur.

MR. JUSTICE MCCAMANT took no part in the consideration of this case.

Motion to dismiss appeal allowed June 26, 1917.

SMITH *v.* DIRECTOR.

(165 Pac. 1171.)

Appeal and Error—Service of Notice of Appeal—Jurisdiction.

1. Presence in the transcript of proof of service of notice of appeal is jurisdictional.

From Multnomah: GEORGE N. DAVIS, Judge.

On motion to dismiss appeal. Motion sustained and appeal dismissed. Appeal dismissed.

Mr. Morris A. Goldstein, for the motion.

Mr. S. J. Silverman, contra.

In Banc. MR. JUSTICE BENSON delivered the opinion of the court.

1. The transcript discloses that the notice of appeal was filed February 14, 1917, but does not contain any proof of service thereof. Appellant has filed his affidavit to the effect that he did serve the notice of appeal and file proof thereof, but that such proof was lost or mislaid in the clerk's office. Since the presence of such proof in the transcript is jurisdictional (*Wolf* v. *Smith,* 6 Or. 73), the motion must be allowed and the appeal is dismissed. APPEAL DISMISSED.

Argued May 24, reversed June 26, 1917

PORTLAND GAS & COKE CO. *v.* GIEBISCH.

(165 Pac. 1004.)

Municipal Corporations—Injury to Gas-mains from Sewer Construction—Liability.

1. A gas company could not recover damages to its mains necessarily resulting from construction of a city sewer, since a municipality does not abdicate its paramount right in a street by giving a franchise therein to a public service corporation, and the gas company's franchise was subordinate to the city's control of the streets.

[As to franchise as a privilege, a property or an easement, see note in 131 **Am. St. Rep.** 864.]

Municipal Corporations—Construction of Sewer—Duty to Use Care.

2. A municipality and its contractor are obliged to use reasonable care in construction of sewers and will be liable for damages occasioned by negligence in the performance of the work to property of a gas company consisting of its mains, pipes and appliances situate in the public streets.

Municipal Corporations—Injury to Gas-mains from Sewer Construction—Liability for Negligence.

3. Where it was possible to construct sewers without injuring gas-mains, the gas company could recover from a city contractor damages for the latter's negligence resulting in disturbance of mains, leakage of gas and fire.

Municipal Corporations—Injury to Gas-mains from Sewer Construction—Item of Recovery—Patrolling Streets.

4. A gas company could not recover from a city contractor a charge for patrolling the streets in which defendants were constructing a sewer, and by whose negligence gas-mains were injured, since, although defendants performed their work with care, plaintiff was chargeable with the duty of patrol and inspection.

Gas Company's Duty to Protect Property Owners.

5. It is the duty of a gas company to protect residents and property owners from damage arising from the escape of gas caused by sewer construction interfering with gas-mains.

From Multnomah: ROBERT G. MORROW, Judge.

Suit by the Portland Gas and Coke Company, a corporation, against A. Giebisch and F. Joplin, partners doing business under the firm name and style of Giebisch & Joplin, in which a decree was rendered in the Circuit Court dismissing the complaint and

plaintiffs appealed. Decree reversed and judgment entered for $1,242.91 and costs and disbursements.

Department 1. Statement by MR. JUSTICE MCCAMANT.

This is a suit brought originally to restrain the defendants from negligent interference with plaintiff's gas-mains in the Montavilla district in the City of Portland. In December, 1913, when the suit was brought, the defendants were engaged in the construction of a sewer in this district, pursuant to a contract given them by the City of Portland. The complaint charges that the work was being done in disregard of plaintiff's rights and to the serious impairment of the service rendered by plaintiff to consumers of gas in the vicinity of the sewer which was under construction. A preliminary injunction was granted by the Circuit Court. The cause was subsequently put at issue and tried out on the question of damages, after the sewer had been constructed. The lower court was of the opinion that the defendants could not be held liable for negligence in performing the work, and the decree dismissed the bill. Plaintiff appeals. REVERSED. JUDGMENT ENTERED.

For appellant there was a brief over the names of *Mr. John A. Laing* and *Mr. H. W. Strong,* with an oral argument by *Mr. Laing.*

No appearance for respondent.

MR. JUSTICE MCCAMANT delivered the opinion of the court.

1. Defendants' brief cites a respectable line of authority to the effect that a municipality does not abdicate

its paramount right in a street by giving a franchise therein to a public service corporation: Booth on Street Railways (2 ed.), § 42; *National Water Works Company* v. *City of Kansas,* 28 Fed. 921; *Kirby* v. *Citizens' Ry. Co.,* 48 Md. 168 (30 Am. Rep. 455); *Scranton Gas Co.* v. *City of Scranton,* 214 Pa. St. 586 (64 Atl. 84, 6 Ann. Cas. 388, 6 L. R. A. (N. S.) 1033); *Gas, Light & Coke Co.* v. *Columbus,* 50 Ohio St. 65 (33 N. E. 292, 40 Am. St. Rep. 648, 19 L. R. A. 510); *City of San Antonio* v. *San Antonio Street Ry. Co.,* 15 Tex. Civ. App. 1 (39 S. W. 136); *Brooklyn Electric Co.* v. *City of Brooklyn,* 37 N. Y. Supp. 560. These authorities abundantly sustain the proposition that plaintiff cannot recover in this cause for any damage which necessarily follows from the construction of the sewer. The City of Portland was within its rights in authorizing such construction and the franchise under which plaintiff maintained its service is subordinate to the paramount control over the streets, vested in the municipality.

2. None of the foregoing authorities on which defendants rely involved charges of negligence. Even if the City of Portland in its corporate capacity had constructed the sewer it would have been bound under the law to exercise due care in the premises and would have been liable for any damages occasioned by its negligence in the performance of the work: *Giaconi* v. *Astoria,* 60 Or. 12 (118 Pac. 180, 37 L. R. A. (N. S.) 1150); *Warren* v. *Astoria,* 67 Or. 603 (135 Pac. 527). A contractor performing the work at the instance of the city is also chargeable with the duty of reasonable care, and is liable in damages for negligence in the performance of the work: *Pacific Laundry Co.* v. *Pacific Bridge Co.,* 69 Or. 306 (138 Pac. 221); *Millville Gas Co.* v. *Sweeten,* 75 N. J. L. 23 (68

Atl. 1067); 6 McQuillin on Municipal Corporations, § 2695; 3 Dillon on Municipal Corporations (5 ed.), § 1243. Even if the City of Portland had had the power to relieve the defendants from their obligation to perform the work with due care it did not attempt to do so in this case. On the contrary, the specifications attached to the contract of the defendants contained the following stipulation:

"The contractor shall at his own expense carefully protect from injury, trees, buildings, telephone, telegraph or light poles; water or gas pipes, conduits, drain culverts, or any other structures, public or private, which are encountered or affected by the work, and shall repair any damage done to the said structures, leaving them in as good condition as they were previous to this interference, and the contractor shall be liable for any damages or claims arising from his interference with said structures."

Plaintiff has a property right in its mains, pipes and appliances, situate in the public streets, and this property right is entitled to protection: 20 Cyc. 1168.

3. The following allegation contained in plaintiff's complaint is admitted by the answer of the defendants:

"Plaintiff alleges that it is practicable for defendants to so dig said sewer ditch as not to injure plaintiff's gas mains, services and property, and not to injure its business, and not to disturb or destroy its service to a large number of the people of the city of Portland, by properly bracing the sides of said ditch as the ditch is being dug and by being careful in its work in and around the services of plaintiff in said streets, the exact location of all of which services and gas mains defendants know and have been informed."

The testimony of the defendant Giebisch also admits that it was possible for the defendants, by properly

shoring up the sides of its ditch, to prevent the earth from sliding and so disturbing the gas-mains of plaintiff. The testimony shows clearly that the work done by the defendants materially interfered with plaintiff's pipes and mains. A number of pipes connecting gas-mains with the houses of plaintiff's patrons were torn out by the defendants. Plaintiff's mains in other cases were left suspended in the air without support from the earth, resulting in leaks and in a fire which threatened great damage and was extinguished with difficulty. A small part of the damage asserted by plaintiff was admitted by the defendants. Bills to the amount of $43.29, presented by plaintiff to the defendants, were approved by H. W. Joplin on behalf of the defendants.

We think that plaintiff is entitled to relief.

4, 5. The damages claimed by plaintiff amount to $1,742.91; they are specified and proved with unusual exactness. Included in the above amount is a charge of $778.69 for patrolling the streets on which defendants were working. An additional charge of 10 per cent for overhead is superimposed on this amount, making the total charge for this purpose $856.56. The evidence fails to satisfy us of the reasonableness of this charge against the defendants. It was the duty of plaintiff to protect residents and property owners in the neighborhood from damage arising from the escape of gas: *Sharkey* v. *Portland Gas etc. Co.*, 74 Or. 327, 331 (144 Pac. 1152, 145 Pac. 660). The sewer constructed by defendants paralleled plaintiff's gas-mains for fourteen blocks; at frequent intervals service pipes ran from the mains to houses. Even if defendants had performed their work with care, plaintiff would have been chargeable with the duty of patrol and inspection. This item of plaintiff's claim

will therefore be reduced by $500. We are convinced that the remainder is an adequate sum to cover the reasonable expense of such inspection and superintendence as are chargeable to defendants' negligence.

We think that plaintiff should have judgment for its claim, with the above modification. The decree will therefore be reversed and a judgment entered in favor of plaintiff for $1,242.91, and for the costs and disbursements in this court and in the Circuit Court.

REVERSED. JUDGMENT ENTERED.

MR. CHIEF JUSTICE MCBRIDE, MR. JUSTICE BURNETT and MR. JUSTICE HARRIS concur.

Submitted on briefs June 5, affirmed June 26, 1917.

ROBERTS v. BODLEY.

(165 Pac. 1172.)

Evidence—Mental State as Issuable Fact—Declaration as Evidence.

1. In suit to recover the price of a mare which plaintiff claimed he sold and delivered to defendant, where plaintiff took the mare to defendant's farm for trial, and claimed that defendant worked her, said she would answer, and promised to pay for her, but defendant contended that when plaintiff went away, they agreed that he would give the mare a further trial, and return her if she proved unsatisfactory, testimony that after plaintiff went away the witness said to defendant: "Are you going to take the animal?" and he answered: "I am not perfectly satisfied with her. As soon as I get the kale in I will work her on the hay"—was competent as tending to show defendant's state of mind as to whether the mare suited him, there being nothing to show that defendant's remark was other than a perfectly natural and spontaneous expression indicating the state of his mind.

[As to presumption of and burden of proof of insanity, see note in 140 Am. St. Rep. 347.]

From Clackamas: JAMES U. CAMPBELL, Judge.

This is an action by William P. Roberts against Donald Bodley, originating in an alleged sale and

purchase of a horse and culminating in a lawsuit. From a verdict in favor of defendant, plaintiff appealed. Affirmed.

In Banc. Statement by MR. JUSTICE BURNETT.

The plaintiff sues to recover from the defendant $150 alleged to be the reasonable and agreed price to be paid for a mare which the plaintiff says he sold and delivered to the defendant.

The answer denies the whole complaint and avers in substance that the plaintiff offered to sell the mare to the defendant and the latter took her on trial, agreeing to purchase her if she proved satisfactory, but after testing her she proved to be unsatisfactory to him, whereupon he returned her to the plaintiff who has ever since then had possession of her. No reply appears in the abstract. It seems, however, that the case was heard as though issue had been joined on the new matter in the answer.

The only assignment or error argued in the brief is grounded upon the following: It seems that the plaintiff took the animal to the defendant's farm for trial. The contention of Roberts is that the defendant worked her, said she would answer every purpose, and promised to pay for her on the following Saturday or Sunday whereupon the plaintiff left. Bodley maintained that when Roberts went away it was agreed between them that he would give her a further trial and return her if she proved unsatisfactory. The defendant called a witness named Kelliker who testified that he was present on that occasion and while the defendant was driving the mare hitched with another horse to a disc harrow the witness said to Roberts: "That is a pretty fair animal." Rob-

erts answered: "It is gentle but has not been worked for some time." He then testified that the defendant drove up and when the witness asked him, "Are you going to take the mare?" Bodley replied, "Well, I will have to try her out, and if she proves satisfactory to me I might then." All this conversation took place in the presence of the plaintiff and no objection was made to that, but the Court allowed the witness further to testify about what was said after Roberts had gone away: "Then I went on helping to plant kale and Don [meaning Bodley] went on around a few more times and Mr. Roberts went away, and I said to Don, 'Do you think you will take the animal?'" The objection to the testimony as narration of something said in the absence of the plaintiff having been overruled, the witness continued: "So Mr. Roberts went away and I said to Don, 'Are you going to take the animal?' and he said, 'I am not perfectly satisfied with her. As soon as I get the kale in I will work her on the hay.'" The admission in evidence of Bodley's answer to Kelliker's query propounded in the absence of Roberts constitutes the only fault urged by the plaintiff against the proceedings at the trial. The jury returned a verdict for the defendant. The plaintiff appeals from the resulting judgment.

Submitted on briefs under the proviso of Supreme Court Rule 18: 56 Or. 622 (117 Pac. xi).

AFFIRMED.

For appellant there was a brief by *Mr. C. D. Purcell* and *Mr. B. N. Hicks.*

For respondent there was a brief over the name of *Mr. George Tazwell.*

MR. JUSTICE BURNETT delivered the opinion of the court.

1. It was in issue before the jury whether the mare suited the defendant. This involved the state of his mind on that subject and the question is whether the declarations of the defendant to the witness Kelliker are competent for the proof of that matter. The plaintiff cites in support of his attack upon the ruling of the court *Sullivan* v. *Oregon R. & N. Co.*, 12 Or. 392 (7 Pac. 508, 53 Am. Rep. 364), and *Fredenthal* v. *Brown*, 52 Or. 33 (95 Pac. 1114). In the Sullivan Case the plaintiff sued to recover damages for a hurt received by him when ejected from one of the defendant's trains. After having testified to the matter in question himself he called a witness who stated in substance that two or three minutes after the train in question had passed he heard someone call out and on going to the spot he found the plaintiff who said in effect, answering an inquiry of the witness about what was the matter, that the conductor pushed him off or threw him off the train. This court rejected that testimony as not being part of the *res gestae*. In the Fredenthal Case the plaintiff was hurt by the fall of a sling-load of lumber during the loading of a ship upon which he was working as a stevedore. As imputing blame to the defendant, the plaintiff offered the statement of the engineer in charge of the donkey engine used in handling the lumber in purport that he could not hold the load with the machine then in use. In both these cases the effort was to prove the principal fact in dispute by testimony which was not part of the *res gestae*. An act apparent to the senses and capable of description was the subject of inquiry in each of those cases. The subsequent declarations were not part of that act and lacked the spontaneity

necessary to make them so. Here the fact sought to be established, although vital to the defendant's case, is the state of mind of the defendant, whether of satisfaction or dissatisfaction with the mare alleged to have been sold to him. The phenomena by which mental conditions are usually ascertained are the words and actions of the individual whose mind is under consideration. Indeed there is but little else available primary proof in such a case. If what he says is spontaneous and devoid of malingery, it is received as original evidence to aid the jury in ascertaining the ultimate fact in dispute which, in this instance, was the state of Bodley's mind, whether satisfied or not with the quality of the animal. Much depends on the circumstances of each case. The trial judge is vested with discretion in the premises to reject as self-serving those expressions uttered so remotely as to give them the flavor of being manufactured for the occasion and to receive those manifestly spontaneous as indicative of the true mental situation under scrutiny.

The matter of the admissibility of the declarations of one whose attitude of mind at the time is being considered was exhaustively treated by Mr. Justice HARRIS, a writer of one of the majority opinions in *State* v. *Farnum*, 82 Or. 211 (161 Pac. 417). The defendant there was accused of murdering Edna Morgan. It was necessary to prove that she met him and went with him to a barn where her dead body was afterwards found. Witnesses were permitted to state that during the afternoon before her disappearance she refused to go home with them because, as she said, "she could not as she thought Roy [meaning the defendant] was coming down." This testimony was assailed by the defendant on the ground that it was

hearsay, not part of the *res gestae,* and that the declaration of the girl was made not in his presence. After an extended review of the authorities on that side of the question the discussion is summed up thus:

"If the doing of an act is a material question, then the existence of a design or plan to do that specific act is relevant to show that the act was probably done; and, considering the plan or design as a condition of the mind, a person's own statements of a present existing state of mind, when made in a natural manner and under circumstances dispelling suspicion and containing no suggestion of sinister motives, only reflect the mental state, and therefore are competent to prove the condition of the mind, or, in other words, the plan or design."

In the instant case the talk between Kelliker and the defendant was virtually a continuance of the conversation begun in the presence of the plaintiff although at the moment he had left the scene. There is nothing to show that it was other than a perfectly natural and spontaneous expression on the part of the defendant indicating the state of his mind on the subject of whether he was satisfied with the animal. On the hypothesis that the doctrine elucidated by Mr. Justice HARRIS is sound law in a case where the life-long liberty of the defendant was involved, it is controlling in a horse trade where the plaintiff still has the horse and the defendant retains the purchase money. The judgment is affirmed. AFFIRMED.

Argued June 5, reversed and remanded June 26, 1917.

WHITE v. PORTLAND GAS & COKE CO.

(165 Pac. 1005.)

Gas—Highways—Action for Injuries—Liability of Gas Company.

1. If plaintiff's injury was due solely to the negligence of the automobile driver with whom she was riding as a guest, and not to the manner in which defendant, who laid gas-pipes along the highway, had refilled the trenches, she could not recover.

[As to imputing negligence of driver of automobile to occupant, see note in Ann. Cas. 1913B, 684.]

Gas—Highways—Actions for Injuries—Instructions.

2. In an action by plaintiff for injuries alleged to have been caused by the wheels of the automobile in which she was riding going down into the loose dirt, refilled into trenches dug along the highway by defendant, when turning out to avoid colliding with an approaching car, where there was evidence that the approaching car was being driven rapidly and taking the greater part of the highway, an instruction that, if the accident was due to the negligence of those in control of the other automobile, defendant was not liable was proper.

Negligence—Guest in Automobile—Due Care.

3. While the negligence of the driver of an automobile cannot be imputed to a guest therein, the guest must exercise such care for his own safety as a reasonably prudent person would under like circumstances.

Negligence—Contributory Negligence—Guest in Automobile—Question for Jury.

4. Whether the guest in an automobile has exercised reasonable care for his own safety is usually a question for the jury.

From Clackamas: JAMES U. CAMPBELL, Judge.

This is an action by M. L. White against the Portland Gas & Coke Company, a corporation, for an injury caused by defendant's alleged negligence. There was a jury trial resulting in a verdict in favor of defendant, and from granting a new trial on motion of plaintiff, defendant appealed. Reversed and remanded with directions.

Department 1. Statement by MR. JUSTICE BURNETT.

The plaintiff brought this action stating in substance that by permission of the County Court of

Clackamas County the defendant dug a trench along the edge of the traveled portion of the county road leading from the north towards Oregon City and installed therein a gas-main, but so negligently refilled it that the highway was rendered unsafe in that the wheels of vehicles would sink into the fill. She avers in effect that as she was riding lawfully in an automobile on that thoroughfare as the guest of a friend who operated the car, it was turned out to the right to meet another one coming from the opposite direction, and while the machine she occupied was being carefully operated and driven slowly the loose earth in the trench gave way under the wheels so that they skidded, in consequence of which the automobile rolled down the embankment on the right of the road, resulting in her injury.

It is admitted that there was an accident at the place mentioned in the complaint by reason of which the plaintiff received an injury, but otherwise the declaration is traversed in all material particulars. It is stated in the answer that the automobile was being driven at a dangerous rate of speed and that it was turned out so sharply to the right on meeting the other car that it became unmanageable and ran off the side of the road, causing the injury. As against the plaintiff herself, it is alleged:

"That the said accident did not happen through any negligence on the part of said defendant, but happened because the said plaintiff and the person driving said machine, who was under the direction and control of the said plaintiff at the time of the said accident, did not properly or safely drive said machine, but drove the same at a too fast and dangerous rate of speed * * and the said plaintiff while the said machine in which she was riding was being operated, although she knew and understood and appreciated all of the conditions under which said machine was

being operated, and the speed under which said machine was being operated, at the time, made no remonstrances with the driver of the machine in which she was riding as to the careless and negligent manner in which said machine was being operated, and without objection or remonstrance permitted the said driver to drive the said machine at said dangerous and reckless rate of speed, although the said plaintiff was in a position to warn the driver of the automobile in which she was riding of the impending danger, and said accident could have been avoided had the said plaintiff remonstrated with the driver of said machine, or warned him or protested against the dangerous manner in which said machine was being operated and said machine was being operated with the consent of the said plaintiff in said dangerous and reckless manner, all of which was sufficient and should have caused the said plaintiff to understand the conditions, and it was apparent to said plaintiff under the conditions that said automobile in which she was being driven was being driven recklessly and carelessly, all of which was negligence contributing to said accident herein."

This was denied by the reply. The jury trial resulted in a verdict for the defendant. The plaintiff filed a motion for a new trial urging, among other things, that the trial court erred in giving the following instructions:

1. "The defendant in this case is not liable for any negligence if there was any negligence on the part of Mr. Rands, who was driving this automobile in which the plaintiff was riding at the time of the accident, and if this accident happened solely on account of the negligence of Mr. Rands, then the plaintiff is not entitled to recover."

2. "Contributory negligence is simply the failure on the part of the person injured to exercise reasonable and ordinary care under the particular circumstances. The defendant in his answer has set forth

certain allegations wherein it is alleged that the plaintiff in this case was guilty of contributory negligence, contributing to bring about the accident, and I instruct you that if the plaintiff was guilty of negligence contributing proximately to bring about the accident and injury in any of the particulars set forth in defendant's answer, then the plaintiff cannot recover."

3. "There has been some evidence in this case that there was another automobile proceeding in a northerly direction on this hill on which the accident happened, and if you should find from the evidence in this case that this accident happened solely on account of the negligence of the automobile that was proceeding in a northerly direction, then I instruct you that the plaintiff would not be entitled to recover in this action, or if you find from the evidence that this accident happened solely on account of the concurring negligence of the people who were in the automobile going in a northerly direction on the hill and the negligence of Mr. Rands who was driving the machine, then your verdict should be for the defendant."

The court allowed the motion basing its conclusion on the giving of instruction numbered 1, and ignoring the other assignments. The defendant appeals.

REVERSED AND REMANDED WITH DIRECTIONS.

For appellant there was a brief over the names of *Mr. George C. Brownell, Messrs. Stapleton & Conley* and *Messrs. Wilbur, Spencer & Beckett,* with an oral argument by *Mr. H. B. Beckett.*

For respondent there was a brief over the names of *Mr. C. Schuebel* and *Mr. Livy Stipp,* with an oral argument by *Mr. Schuebel.*

MR. JUSTICE BURNETT delivered the opinion of the court.

Supporting the complaint there is evidence to the effect that, at the invitation of Mr. Rands as his

guest, the plaintiff with her two daughters and his wife went riding in his automobile. Mrs. White sat on the left side in the rear seat, one of her daughters next to her, and Mrs. Rands on the right, while another daughter rode on the right of Mr. Rands on the front seat. They were proceeding towards Oregon City from the north on the main traveled road and were going down a hill which had been cut down, using the excavated earth to make a fill about ten feet in height near the foot of the hill. This fill was graveled to a width of about fourteen feet. The gas-main was laid in a ditch approximately two feet in depth, about fourteen inches in width, and some two feet west of the edge of the gravel. The slope on the sides of the fill was quite steep. Testimony on behalf of the plaintiff is to the effect that as they approached it another automobile was being driven quite rapidly up the hill meeting them occupying the major portion of the graveled road; that the Rands' machine was going at the rate of about three or four miles an hour; that when turned to the right the off wheels sank into the loose earth some six or eight inches and ran thus ten or fifteen feet in the ditch when, owing to the declivity, it turned over, rolled down the embankment lodging against a fence and injuring the plaintiff.

The testimony for the defense is to the purport that the track of the off wheels of the automobile driven by Rands led to the right and across the trench at an angle of about sixty degrees and then proceeded parallel with it some distance, making then a slight turn to the left, and immediately afterwards turning precipitously down the embankment. One of the plaintiff's daughters testifying, said the other car was coming pretty fast occupying the greater part of the road and was larger than the one driven by Rands.

The plaintiff stated as a witness that she felt the rush of the air of the car they met and thought they might collide with it. She says she knew the general lay of the land and that the gas-main had been laid in that neighborhood, but that she did not interfere with or protest with Rands about his method of driving.

1. The principal complaint of the plaintiff is about the giving of the instruction first quoted. The exception urged before the Circuit Court was against it as an entirety. The attack made upon it was to the effect that it "did not properly state the law of negligence or contributory negligence which would excuse the negligence of the defendant, and that it assumed as a matter of law the responsibility of the plaintiff for the actions and negligence of Mr. Rands." In the first place it is clear that if "this accident happened solely on account of the negligence of Mr. Rands then the plaintiff is not entitled to recover." This is because there was no relation existing between Rands and the defendant which would render the latter liable for his shortcomings and consequently that part of the instruction was sound. Therefore if we regard the principle laid down by the precedents to the effect that if part of an instruction objected to is sound it will save the remainder, we cannot countenance the objection to the one in question: *Murray* v. *Murray*, 6 Or. 17; *Salomon* v. *Cress*, 22 Or. 177 (29 Pac. 439); *McAlister* v. *Long*, 33 Or. 368 (54 Pac. 194). Moreover, the charge now under consideration does not in any way impute to the plaintiff the negligence of Rands. It is one thing to charge her with his negligence and quite another to exonerate the defendant from its effect. The whole subject of that excerpt was the negligence of Rands. Nothing else

was discussed therein and it was left to the jury to determine whether he was negligent or not. The sum of the situation on that branch of the case is that if the negligence of Rands, provided there was such negligence, was the sole cause of the injury the defendant could not be held responsible. This is a reasonable paraphrase or interpretation of that part of the charge to the jury.

2. Plaintiff also urged before the trial court that there was no testimony justifying the instruction numbered 3 to the effect that if the accident happened solely on account of the negligence of the people in the other automobile or solely on account of their negligence and that of Rands together the verdict should be for the defendant. As noted above, the testimony tends to show that the other car was being driven rapidly up the hill taking the greater part of the graveled way so that it practically crowded the Rands machine out of the road at least to a large extent. This would be negligence on the part of those in control of the other automobile and if, as the jury may have found, it operated to compel Rands to turn out to avoid what seemed to be the greater danger of collision so that this was the single cause of the accident it would exonerate the defendant. This instruction was predicated on the hypothesis that the mishap resulted solely from the negligence of parties over whom the defendant had no control. In order to sustain this instruction it is only necessary to point out that there was some evidence to go to the jury on that subject.

3, 4. The most difficult proposition is whether the court erred in giving instruction numbered 2 on the subject of contributory negligence. It has been decided very frequently and in some of our own precedents

that the negligence of one operating an automobile cannot be imputed to his guest: *Tonseth* v. *Portland Ry. L. & P. Co.*, 70 Or. 341 (141 Pac. 868). That, however, is not the precise question in hand. The guest cannot abdicate his duty to use reasonable diligence in caring for himself. As said in *Thompson* v. *Los Angeles etc. Ry. Co.*, 165 Cal. 748 (134 Pac. 709, 712):

"It is of course true that a passenger in a vehicle operated by another is bound to exercise ordinary care for his own safety."

If such passenger is aware that the operator is carelessly rushing into danger it may be incumbent upon him to take proper steps for his own safety. Whether the occupant has exercised reasonable care in the matter involved is usually a question for the jury. The standard of care is the conduct of a reasonably prudent person in such environments. The application of this rule must be left to the judgment of the twelve triers of the fact. It may be that Rands' attention was so thoroughly riveted upon the approaching car as to make him unconscious of being so near the edge of the embankment, and that if his attention had been called to that matter by the plaintiff he would have avoided the slope. It may be also that the jury considered she was remiss in her duty in not warning him. We cannot say as a matter of law whether she was heedless or not. It must be left to the jury whether she failed in her duty as a reasonable person under the circumstances in not calling the attention of Mr. Rands to the danger of going over the embankment in his effort to avoid a collision with the other machine. Under the conditions disclosed by the record, the court was not in

error in giving an instruction on contributory negligence.

Negligence may be grounded in action or refusal to act, in speaking or failing to speak, all with reference to duty in the premises. We can easily conceive of cases where a clamor of direction by the guest would confuse a driver or chauffeur and increase the danger in a manner amounting to contributory negligence of the passenger. In others the duty to utter warning might be imperative. In some instances it would be rank folly to wrest the reins or the wheel from the hands of the one in charge of the vehicle. In others it might be highly necessary to do that very thing. The court cannot lay down a mathematical precept as a rule of law enjoining in detail what should be said or done or omitted in every juncture of danger. It is plain, however, that an invited guest is not to be supine and inert as mere freight. Accepting the hospitality of his friend does not excuse him from the duty of acting for his own safety as a reasonably prudent person would under like conditions. Whether he does so or not must be decided by the twelve who declare the facts embodied in the verdict.

The distinction between the doctrine that the fault of the driver is not to be imputed to his guest and the other principle that the guest himself may be guilty of contributory negligence in not acting as a reasonably prudent person would in the exigency involved is elaborated in *Dale* v. *Denver City Tramway Co.*, 173 Fed. 787 (97 C. C. A. 511, 19 Ann. Cas. 1223, and note); *Christopherson* v. *Minneapolis etc. Ry. Co.*, 28 N. D. 128 (147 N. W. 791, Ann. Cas. 1916E, 683 and note, L. R. A. 1915A, 761, and note); *Wachsmith* v. *Baltimore & O. R. R. Co.*, 233 Pa. St. 465 (82 Atl. 755, Ann. Cas. 1913B, 679, and note); *Anthony* v. *Kiefner*,

96 Kan. 194 (150 Pac. 524, Ann. Cas. 1916E, 264, and note, L. R. A. 1915F, 876); *Rebillard* v. *Minneapolis etc. Ry. Co.*, 216 Fed. 503 (133 C. C. A. 9, L. R. A. 1915B, 953).

The conclusion is that the trial court did not err in its instructions to the jury but was mistaken in its ruling granting a new trial. The order to that effect is therefore reversed and the cause remanded to the Circuit Court with directions to reinstate the original judgment for the defendant: *Sullivan* v. *Wakefield*, 65 Or. 528 (133 Pac. 641).

REVERSED AND REMANDED WITH DIRECTIONS.

MR. CHIEF JUSTICE MCBRIDE, MR. JUSTICE BENSON and MR. JUSTICE HARRIS concur.

Argued June 11, writ allowed June 26, 1917.

BENSON *v.* WITHYCOMBE, GOVERNOR.

(166 Pac. 41.)

Statutes—Construction—Enactment by Same Legislature.

1. Where statutes relating to the same subject have been favorably acted upon by the requisite majorities in each house of the same legislative assembly, all the clauses of the several enactments should be construed together, so as to permit each to remain intact, unless some provision is so repugnant to succeeding sections that both cannot exist at the same time as substantive law, in which case the later one necessarily controls.

Highways—Bond Issues—Statutes.

2. Laws 1917, Chapter 423, Section 8, subdivision 5, providing that the funds with which to pay the portion of the expense of construction of post roads and forest roads payable by the state, under its agreement with the federal government, made by Laws 1917, Chapter 175, Section 1, accepting the provisions of Act of Congress, July 11, 1916, Chapter 241, Section 1 (39 Stat. 355, U. S. Comp. Stats. 1916, § 7477a), shall be secured by the sale of bonds, "as is provided in House Bill No. 21" (Laws 1917, c. 175), applies exclusively to the sale by the State Board of Control, and not by the state highway commis-

sion, of such evidences of indebtedness, no part of which can be made up from the $6,000,000 to be raised by issuing bonds for the amount.

Statutes—Repeal by Implication.

3. Repeals by implication are not favored, but where two statutes are so repugnant that both cannot stand, the later necessarily operates as an implied repeal of the earlier.

[As to repeal of statutes by implication, see notes in 14 Am. Dec. 209; 88 Am. St. Rep. 271.]

Highways—Statutes—Amendment.

4. Laws 1917, Chapter 423, Sections 11, 12, providing that the State Highway Commission shall pay the interest on state bonds issued for highway purposes from any funds subject to its control, etc., and that the money received from motor license fees, after the payment of certain expenses, shall be expended under the jurisdiction of the State Highway Commission in payment of the interest and principal of the bonded indebtedness of the state contracted for road purposes under the provisions of Laws 1917, Chapter 175, accepting the offer of the federal government made by act of Congress July 11, 1916, to furnish money for post roads, has impliedly amended all the preceding enactments relating to the construction, operation, and maintenance of state highways and the issuance of funds therefor.

Highways—Sale of State Bonds—Duty of Board of Control—Statutes.

5. Where, after the State Highway Commission complied with Laws 1917, Chapter 237, Section 13, and set aside sufficient funds to meet payments specified in the order, no money remained in the state highway fund with which to match the federal appropriation for post and forest roads offered by act of Congress of July 11, 1916, and accepted by Laws 1917, Chapter 175, the sale of state bonds in an amount sufficient to raise enough money to meet the appropriation for the year devolved on the State Board of Control.

Original proceeding in Supreme Court.

In Banc. Statement by MR. JUSTICE MOORE.

The plaintiffs, S. Benson, W. L. Thompson and E. J. Adams, as the State Highway Commission, instituted in this court a proceeding against the defendants, James Withycombe, Ben W. Olcott, and Thomas B. Kay, the Governor, Secretary of State, and State Treasurer, respectively, as the State Board of Control, to compel them to issue and sell state bonds. An alternative writ of *mandamus* having been issued states in effect that pursuant to the act of Congress of July 11, 1916 (39 U. S. Stat. 355), the provisions

of which were accepted by the legislative assembly of Oregon (Gen. Laws Or. 1917, Chap. 175), there have been duly set apart for the year 1917 to aid in the construction of rural post roads $236,062.11 and to help in building roads and trails $255,905, amounting to $491,967.11, which sum will lapse unless Oregon furnishes a like donation during that period to assist in such work; that various counties of the state taking advantage of Chapter 237, Gen. Laws Or. 1917, have provided for raising large sums of money to secure parts of such federal aid within their borders, and have requested the plaintiffs definitely to locate and establish the grades of highways within such *quasi* municipalities, thereby necessitating an outlay of funds subject to plaintiffs' control approximating $173,140, and to operate and maintain highways already constructed will require, during the year 1917, a further expenditure by the plaintiffs of about $71,450, amounting to $244,590, while there is on hand as the state highway fund only $238,535.58 with which to meet the payment of such obligations; that in order to obtain the first installment of such federal aid, and thus prevent its ultimate loss, it is necessary for Oregon immediately to raise the sum of $491,967.11 by issuing and selling state bonds requisite for that purpose; that to procure such an amount the plaintiffs at a regular meeting of the State Highway Commission adopted a resolution directing its chairman to demand of the defendants, as the State Board of Control, an issue and sale of state bonds as required by Chapter 175; that complying therewith such chairman notified the defendants, as such board, of the amount of money required from the state during the year 1917, and demanded that they issue and sell state bonds suffi-

cient to raise the amount specified, but they declined and refused to comply with such request or to take any action in the matter.

A demurrer was interposed to the alternative writ on the ground that it did not state facts sufficient to warrant the granting of the relief demanded.

DEMURRER OVERRULED.
PEREMPTORY WRIT ISSUED.

Mr. George M. Brown, Attorney General, and *Mr. Isaac H. Van Winkle,* Assistant Attorney General, for the demurrer.

Mr. Jay Bowerman, contra.

MR. JUSTICE MOORE delivered the opinion of the court.

In addition to these facts parts of statutes are set forth in the alternative writ which plaintiffs' counsel maintain require a compliance with the terms of such command. The defendants' counsel admit the facts hereinbefore stated, but deny that the provisions of the law invoked authorize the granting of a peremptory writ. The solution of the question thus presented must depend upon the construction to be given to several statutes enacted at the session of the legislative assembly held in the year 1917, relating to the raising and disbursing of public funds for road purposes. Considering these matters in the order of their approval Section 1 of Chapter 175 accepts the provisions of the act of Congress referred to, and agrees to cooperate with the Federal Government in carrying the clauses thereof into effect. Chapter 339, Gen. Laws Or. 1913, created a State Highway Commission, com-

posed of the Governor, Secretary of State and State Treasurer, and required the State Tax Commission annually to levy a tax equal to one fourth of a mill on each dollar of assessable property, which exaction was to be known as the "state road fund." Section 2 of Chapter 175, Gen. Laws Or. 1917, which legislative session without again mentioning it will be understood unless some other term is expressly stated, commands the state board having control of public highways, out of the money called the highway funds, annually to set aside a sufficient sum to comply with the terms of the federal act,

"and if there is any deficiency in said highway fund for such purpose, then the State Board of Control of the state of Oregon is hereby authorized, empowered, and directed each year during the next five years to sell the bonds of the state of Oregon in an amount sufficient to raise enough money which, taken together with any money available from appropriations from other funds of the state of Oregon, if any there be, to equal the amount required of the state of Oregon in order to fully meet the requirements, conditions, and provisions of said Federal statute, and the Federal officials operating under said statute; *provided, however,* that such bonds shall not be issued unless necessary to enable the state of Oregon to avail itself of the Federal aid as provided hereinabove, or any other aid hereafter furnished by the United States."

A part of Section 4 of that chapter reads:

"After the funds, if any, which have been appropriated from the current moneys of the state for the purpose of meeting the requirements of this act have been exhausted, or if no appropriation therefor has been made, then each year said State Board of Control shall sign, date, issue, and sell bonds as required to raise funds sufficient to meet the obligation of the

state of Oregon in carrying on road construction as provided for in said Federal statute."

This act contained an emergency clause and went into effect February 16, 1917, upon its approval.

Though the "State Highway Commission" and the "state road fund" as designated in Chapter 339, Gen. Laws Or. 1913, are respectively referred to in Section 2 of Chapter 175 as "the state board, commissioners, or officers having control of the state highways" and the "highway funds," no mistake could possibly arise in construing the latter phrases as indicating a legislative intent to specify the former expressions.

Chapter 194 requires the Secretary of State annually to issue to owners of motor vehicles licenses permitting the use of such carriages, the amount of the demand depending upon the kind, power, and weight of the vehicle. The money so received must be turned over to the State Treasurer and known as "the motor vehicle fund." Upon deducting therefrom certain charges the remainder is required to be returned to the treasurers of the counties from which the payments were received. This chapter further provides, however, that if the state of Oregon accepts the benefits of the federal appropriation for the construction of post and forest roads, the remainder of the motor vehicle fund, after retaining the necessary expenses, shall on December 31st of each year, while such aid is available, be paid over to the board, commission, or person entitled to disburse it. This act will go into effect August 1, 1917.

Chapter 237 creates a State Highway Commission, pursuant to which statute the plaintiffs were duly appointed and now hold their offices, and an engineer and other employees are also provided for, who col-

lectively are designated as the State Highway Department. Section 12 of that chapter practically reenacts Section 13 of Chapter 339, Gen. Laws Or. 1913, by requiring the State Tax Commission annually to levy one fourth of a mill tax upon all assessable property, which burden is known as the state highway fund, and all moneys thus obtained are to be disbursed by the State Highway Commission. This act contained an emergency clause and went into effect February 19, 1917, upon its approval.

Section 1 of Chapter 423 empowers the State Highway Commission, during the next five years, to sell bonds of the State of Oregon to the amount of $6,000,000, the money derived therefrom to be used to construct public highways, of which sum not more than $1,000,000 can be used during the year 1917. A part of subdivision 5 of Section 8 of that chapter reads:

"The funds with which to pay the portion of the expense of construction of said post and forest roads payable by the state of Oregon, shall be secured from the sale of bonds as is provided in House Bill No. 21 (chapter 175)."

This act was approved by the Governor so far as was necessary in order to refer it to the people to be voted upon June 4, 1917, at which special election it was ratified, and, thereupon, went into full force and effect. These references and excerpts are believed sufficient, with others hereinafter to be mentioned, to explain what parts, if any, of Chapters 175, 194, and 237 were changed or abrogated by subsequent enactments, and particularly by Chapter 423.

1. These statutes having been favorably acted upon by the requisite majorities in each house of the same legislative assembly all the clauses of the several

enactments should be so construed together as to permit each to remain intact, unless some provision is so repugnant to succeeding sections that both cannot exist at the same time as substantive law, in which case the later one necessarily controls: *Smith* v. *Kelly,* 24 Or. 464 (33 Pac. 642); *State* v. *Linn County,* 25 Or. 503 (36 Pac. 297); *Grant* v. *Paddock,* 30 Or. 312 (47 Pac. 712); *Stoppenback* v. *Multnomah County,* 71 Or. 493 (142 Pac. 832); *Richards* v. *District School Board,* 78 Or. 621 (153 Pac. 482).

It will be remembered that Section 2 of Chapter 175, *supra,* requires the officers having charge of the state highways first to set aside out of any money annually received in the highway fund a sufficient amount to comply with the terms of the federal appropriation, and if there be any deficiency in that fund to match such donation, the State Board of Control is directed annually, for five years, to sell the bonds of the state in an amount sufficient to raise enough money which with other available funds will equal the amount required, but such bonds shall not be issued unless necessary to enable the state to avail itself of present or future federal aid. When that chapter was enacted there was a "motor vehicle fund," which was collected by the Secretary of State, who after the payment therefrom of certain expenses turned over the remainder December 31st of each year to the county treasurers of the several counties of the state: Chapter 299, Gen. Laws Or. 1913. That statute had an emergency clause and went into effect February 16, 1917, upon its approval; and this being so it remains to be seen what alterations, if any, were subsequently made to Section 2 thereof. It will be borne in mind that Chapter 194 imposed upon owners of certain carriages licenses, the money to be derived there-

from to be received by the Secretary of State and known as "the motor vehicle fund," which on December 31st of each year was to be turned over to the State Treasurer, who, while Chapter 175 accepting the benefits of the federal aid remains in force, is required to pay the same to the board, commission, or person having charge of the state highways. It will thus be seen that Section 2 of Chapter 175 was thereby impliedly amended by adding to the one-fourth mill tax, known as the "state road fund," the money thereafter to be obtained from the motor vehicle fund, but no part thereof is available for that purpose until December 31, 1917.

Section 7 of Article II of Chapter 237 makes it incumbent upon the State Highway Engineer to furnish county courts of the various counties of the state, without expense to such counties specifications relating to the construction and maintenance of public highways, and upon application therefor he is required to cause such roads or any part thereof to be definitely located and their grades to be permanently established, the cost thereof to be charged on the books of the State Highway Department as a part of the expense of construction. Section 13 of the article last referred to requires the State Highway Commission to set aside from the "highway fund," consisting of the one-fourth mill tax, amounts of money sufficient (1) to meet the payment of salaries and expenses of the State Highway Department, (2) to cover the costs of operating and maintaining state highways which have been constructed or improved, (3) to match the federal appropriation, the remainder, if any, to be used for the purposes of that enactment. The reservation of these several amounts impliedly amended Section 2 of Chapter 175 by deducting from the one-

fourth mill tax levied for state road purposes the various sums so to be set aside in the order stated.

In this condition of the statute last mentioned Chapter 423 having received the requisite majority votes of both branches of the legislative assembly was submitted to and ratified by the people at a special election held June 4, 1917.

Section 11 of that chapter declares:

"The State Highway Commission shall pay the interest upon said bonds as the same shall become due, from any funds subject to its control, from whatever source the same may come, and the payments upon the principal of said bonds, as the same shall become due, shall be paid by the State Highway Commission from any funds within its control, without regard to the origin of said funds."

Section 12 thereof provides:

"Any surplus or unexpended balance of the fees received under the operation of House Bill No. 509 (chap. 194, creating the 'motor vehicle fund') * * remaining after the payment of all claims incurred in carrying out the provisions thereof * * shall be transferred * * to an account to be expended under the jurisdiction of the State Highway Commission in payment of the interest and principal as the same shall become due upon bonded indebtedness of the state of Oregon, contracted for road purposes under the provisions of this act or the provisions of said House Bill No. 21 (chap. 175)."

It will be observed that this section expressly sets aside the "motor vehicle fund" to the payment of interest on bonded indebtedness of the state, and hence no part of the money so to be obtained can be applied to make up the fund required to match the federal appropriation.

It is conceded that the highway department will be obliged to pay during the year 1917, in locating, at

the request of counties, state highways, establishing their grades, and submitting specifications for their construction as required by Section 7, Chapter 237, $173,140, and that the operation and maintenance of highways already constructed, as demanded by Section 13 of that Chapter, will require a further outlay of $71,450, amounting to $244,590, while there is in the state treasury as the proceeds collected in the year 1917 for the one-fourth mill tax, known as the "state highway fund," only $238,535.58. The members of the legislative assembly were undoubtedly aware of this condition and evidently anticipated its possible recurrence for a period of five years during which the federal appropriation was available. In order to meet the requirements of such donation and to match it with an equal appropriation for the furnishing of which the faith of the state is pledged (Section 5, Article II, Chapter 237), and not to trench upon any of the money to be raised by the issue and sale of the $6,000,000 bonds, or to take any part of the "motor vehicle fund," the money derived from which latter source is set apart for the payment of the bonded indebtedness of the state incurred for highway purposes, subdivision 5 of Section 8 of Chapter 423 declares:

"The funds with which to pay the portion of the expense of construction of said post roads and forest roads payable by the state of Oregon shall be secured by the sale of bonds as is provided in House Bill No. 21 (chap. 175)."

The bonds to be issued pursuant to the provisions of Section 2, Chapter 175, were required to be sold by the State Highway Commission, which then consisted of the Governor, Secretary of State, and State Treasurer: Chapter 339, Gen. Laws Or. 1913. Section 4 of

Chapter 423, in referring to the $6,000,000 bonds, reads:

"The State Highway Commission (the plaintiffs herein) shall provide such method as it may deem necessary for the advertisement of each issue of said bonds before the same are sold, and shall also require such deposit with bids as may be required, and generally shall conduct the sale and issuance of said bonds under such rules and regulations not inconsistent with this act as shall be adopted by said commission."

2. Construing in *pari materia* this section in connection with subdivision 5 of Section 8 of that Chapter will show that the latter clause governing "the sale of bonds as is provided in House Bill No. 21 (Chap. 175)" directs that the sale of the bonds to be issued to match the federal appropriation shall be made by the Governor, Secretary of State, and State Treasurer instead of by the plaintiffs herein as in the case of the $6,000,000 bonds. The phrase, therefore, "as is provided in House Bill No. 21," employed in subdivision 5 of Section 8 of Chapter 423, applies exclusively to the sale by the State Board of Control, and not by the State Highway Commission, of such evidences of indebtedness, no part of which can be made up from the $6,000,000 to be raised by issuing bonds for that amount.

The conclusion we have reached is strengthened by the negative argument of C. E. Spence, Master of the State Grange, and others, who, at page 34 of the pamphlet published and sent out by the Secretary of State to the voters prior to the election held June 4, 1917, opposing the ratification of Chapter 423, said:

"Section 8 of the bill provides that the bonds provided for in the Bean (the author of the measure) bonding bill (chap. 175) to be issued only in case of an emergency, shall under House Bill 550 (chap. 423)

be issued and the proceeds thereof be placed in the state treasury to be expended by the State Highway Commission. Then it is not a six million dollar bond issue, but a seven million, nine hundred thousand dollar bond issue."

Our deduction is further fortified by a communication from Mr. J. D. Brown of the Farmers' Union opposing the ratification of Chapter 423, *supra,* published June 2, 1917, in the "Oregon Voter," a magazine printed weekly at Portland, Oregon, and devoted to the advancement of every material interest that tends to promote the general welfare of the state. From the article referred to the following excerpt is taken:

"On June 4 the people of Oregon will have an opportunity to decide whether they favor issuing bonds to the extent of $6,000,000 for the purpose of paving about 400 miles of scenic highways in the state. At the same time will be decided whether bonds to the extent of $1,800,000 provided in the Bean bill (chap. 175, *supra)* shall be issued to pay the interest on the $6,000,000 issue for the first five years these bonds are to run. Thus we will vote for or against the issuing of $7,800,000 of state bonds."

3. The rule is settled that repeals by implication are not favored: *Bower* v. *Holliday,* 18 Or. 491, 496 (22 Pac. 553); *Winters* v. *George,* 21 Or. 251, 257 (27 Pac. 1041); *Sandys* v. *Williams,* 46 Or. 327 (80 Pac. 642). Where, however, two statutes are repugnant so that both cannot stand, the later enactment will necessarily operate as an implied repeal of the earlier law: *Strickland* v. *Geide,* 31 Or. 373, 376 (49 Pac. 982); *In re Booth's Will,* 40 Or. 154, 156 (61 Pac. 1135, 66 Pac. 710); *Cunningham* v. *Klamath Lake R. Co.,* 54 Or. 13, 20 (101 Pac. 213, 1099). Applying these legal principles to the statutes under consideration Section

12 of Chapter 237, providing for the levy of one-fourth mill tax, to be known as the "state highway fund," declares that "all moneys in said fund shall be at the disposal and subject to the use of said commission (the plaintiffs herein) for the purposes of this act." The next section it will be remembered imposes upon the highway commission the duty to apply this fund to the disbursement of matters heretofore enumerated; and the remainder being subject to the control of the State Highway Commission must be applied in payment of interest upon state bonds issued for highway purposes: Section 11, Chapter 423. But if interest be due on state bonds the third item of such fund, or so much thereof as may be necessary, must be devoted to the payment of such interest.

4. By Section 12, Chapter 423, the money received from motor vehicle license fees, after the payment therefrom of certain expenses, is wholly dedicated to the payment of the interest and principal of the $6,000,000 bonds. In these particulars Chapter 423 has impliedly amended all preceding enactments relating to the construction, operation, and maintenance of state highways and to the issuance of funds therefor.

5. It will be kept in mind that the alternative writ states in effect that after the plaintiffs, complying with the provisions of Section 13 of Chapter 237 had set aside sufficient funds to meet the payment thus specified in the order designated, no money remained in the "state highway fund" with which to match the federal appropriation, and that for the year 1917 $491,967.11 was necessary for that purpose.

There can be no reasonable doubt that the sale of state bonds in an amount sufficient to raise enough money to meet that appropriation for the year specified devolves upon the defendants, the performance

of which the law specially enjoins as a duty resulting from an office: Section 613, L. O. L. The alternative writ states facts sufficient to authorize an award of the relief demanded, and this being so the demurrer is overruled. As the entire question so far as it relates to matching the federal appropriation was here presented it follows that a peremptory writ should be issued, and it is so ordered.

DEMURRER OVERRULED.
PEREMPTORY WRIT ISSUED.

Argued March 20, affirmed April 10, 1917.
Rehearing denied June 19, 1917.
Mandate recalled for correction July 3, 1917.

WATSON *v.* CITY OF SALEM.

(164 Pac. 567; 164 Pac. 1184.)

Municipal Corporations — Public Improvements — Notice for Bids — Defective Publication.

1. Failure to publish a notice for bids for a street improvement for the time and in the manner required by Salem City Charter, Section 26, invalidates an attempted special assessment for the improvements, since the provisions for publication are mandatory.

Municipal Corporations — Public Improvements — Notice for Bids — Publication — "For" — "Not Less Than."

2. Salem City Charter, Section 26, requiring notice for bids for a street improvement to be published for not less than five successive days in a daily newspaper, requires the notice to be published for five full days before the right to submit bids is closed, since the word "for" means through, throughout, during the continuance of; and the words "not less than" signify in the smallest or lowest degree, at the lowest estimate.

[As to construction of "lowest responsible bidder," or similar phrase in statute providing for letting of municipal contracts, see note in **Ann. Cas. 1913A, 500.**]

Municipal Corporations — Public Improvements — Notice for Bids — Computation of Period.

3. Under Section 531, L. O. L., providing that the time for publication of legal notices shall be computed so as to exclude the first day of publication, and to include the day on which the act or event of

which notice is given is to happen or which completes the full period required for publication, and Salem City Charter, Section 26, requiring notice for bids for street improvement to be published for not less than five successive days in a daily newspaper, a notice that bids would be opened on June 10th, which was first published on June 5th, and published daily thereafter, to and including June 9th, was insufficient, since the whole of June 10th should have been given in which to file bids before they were opened.

Municipal Corporations—Public Improvements—Notice for Bids—Defective Publication—Effect.

4. The fact that no bids would have been received from other bidders if the full time had been allowed after publication of notice for bids does not validate a special assessment made for street improvements, since the proceeding is *in invitum*, in favor of which no equities will be declared.

ON PETITION FOR REHEARING.

Time—Notice—Computation of Period.

5. Section 531, L. O. L., providing that the time for publication of legal notices shall be computed so as to exclude the first day of publication and to include the day on which the act or event of which notice is given is to happen, or which completes the full period required for publication, applies to the measurement of time for the publication of notices by cities or towns.

From Marion: WILLIAM GALLOWAY, Judge.

Department 2. Statement by MR. JUSTICE HARRIS.

This suit involves the validity of a local assessment for a street improvement. Notwithstanding a remonstrance filed by certain property owners the city entered into a contract for the paving of South 12th Street between Mission Street and the south city limits; and upon the completion of the improvement a special assessment was levied upon the abutting property for the cost of the pavement. Claiming that the assessment was void George J. Watson and twenty-two others commenced this suit for the purpose of freeing their respective parcels of land from the encumbrance of the attempted assessment. Asserting that the assessment was valid in all particulars the city resisted the suit but a trial resulted in a decree for the plaintiffs and the defendant appealed.

AFFIRMED. REHEARING DENIED.

For appellant there was a brief over the names of *Mr. Bert W. Macy,* City Attorney, *Mr. Grant Corby, Mr. William H. Trindle, Mr. Harold D. Roberts, Mr. Rollin K. Page* and *Mr. Woodson T. Slater,* with oral arguments by *Mr. Macy* and *Mr. Corby.*

For respondents there was a brief over the names of *Mr. John H. Carson, Mr. Claire M. Inman* and *Mr. John A. Carson,* with oral arguments by *Mr. Inman* and *Mr. John H. Carson.*

MR. JUSTICE HARRIS delivered the opinion of the court.

The plaintiffs contend that the assessment is void because a sufficient remonstrance was filed against the proposal to pave the street and because the notice for bids was not published in conformity with the provisions of the charter.

Section 28 of the charter directs that a proposed improvement shall not be proceeded with "if the owners of more than two-thirds majority of the superficial area of the property adjacent to such street or part thereof," file a written remonstrance within a specified time. Earnestly arguing that the remonstrance filed did not contain the necessary "more than two-thirds majority of the superficial area" of adjacent property, the city contends that the total superficial area is 1,261,011 square feet; that to be valid the remonstrance must have represented 840,675 square feet; and that the remonstrance was insufficient since it only contained 763,588 square feet. The plaintiffs insist that the remonstrance represented a larger area of superficial square feet than was admitted by the city and that it contained the necessary "more than two-thirds majority" of property. The difference between the

calculation made by the city and that contended for by the plaintiffs arises out of an attempted replatting of some of the property adjacent to the street. All the land had been platted previous to the commencement of the street improvement proceedings. After the proceedings had been begun, but prior to the expiration of the time allowed for the filing of a remonstrance and before the contract was let for paving the street, an attempt was made to replat some of the land abutting upon the street without first vacating the previous plat. The plaintiffs base their calculations upon what we shall designate as the attempted plat while the city makes its estimate from the lots and blocks as shown by the previous plats on the theory that the attempted plat is void since no steps were taken to secure the formal vacation of any of the previous plats. For the purposes of this litigation it will not be necessary, however, to do more than to call attention to the controversy about the remonstrance, since the view we take concerning the publication of the notice for bids is determinative of the suit.

The legal voters of the City of Salem amended their charter in 1911 and among the provisions of Section 26 is the requirement that upon the passage of a resolution by the council declaring its intention to improve a street and approving the plans, specifications and estimates of the city engineer, "the recorder shall duly give notice by publication for not less than five (5) successive days in a daily newspaper published in the city of Salem, Oregon, inviting bids for making said improvement."

The common council adopted a resolution on June 3, 1912, approving the plans, specifications and estimates of the city engineer, declaring its intention to improve South 12th Street and directing the recorder

to publish a notice inviting bids. A notice inviting sealed bids and stating that "said bids will be opened on or after the 10th day of June, 1912, at or about 7:30 o'clock P. M. in open council in the city hall" was published in the "Daily Oregon Statesman" "for five consecutive issues in said paper, to wit: In the issues of June 5, 6, 7, 8, 9, 1912." The council met on June 10, 1912, at 8:10 P. M., and after opening bids referred them to the street committee. Subsequently on June 24th, the council named the lowest bidder and authorized the mayor and recorder to enter into a contract with such bidder. The plaintiffs contend that the notice was not published "for not less than five (5) successive days" while the city argues that a publication of the notice in the daily issues of the newspaper for June 5th, 6th, 7th, 8th and 9th, fully met the requirements of the statute.

1. At the very outset of the inquiry we must remind ourselves that the provision of Section 26 of the charter prescribing the publication of the notice for bids is mandatory. The notice for bids must be published for the time and in the manner required by the charter; and since the mode is the measure of the power a failure to follow the prescribed mode will invalidate an attempted special assessment: *Jones* v. *Salem,* 63 Or. 126, 132 (123 Pac. 1096); *Matter of Pennie,* 108 N. Y. 364 (15 N. E. 611); *Upington* v. *Oviatt,* 24 Ohio St. 232; *Breath* v. *City of Galveston,* 92 Tex. 454 (49 S. W. 575); *Tifft* v. *City of Buffalo,* 25 N. Y. App. Div. 376 (49 N. Y. Supp. 489); *Michel* v. *Taylor,* 143 Mo. App. 683 (127 S. W. 949); *Polk* v. *McCartney,* 104 Iowa, 567 (73 N. W. 1067); *Meuser* v. *Risdon,* 36 Cal. 239; *Kretsch* v. *Helm,* 45 Ind. 438; 28 Cyc. 1027.

2. Analyzing Section 26 of the charter it will be observed that the language embraces two elements: (1)

The period of publication; and (2) the manner of publication. The period of publication must be "for not less than five (5) successive days." "In a daily newspaper" is the prescribed manner of publication.

The term "for" and the words "not less than" appear in the quoted provision. When used in the connection in which we now find it the term "for" means "through; throughout; during the continuance of": Century Dictionary. If the charter read that the notice must be published "for five days," by the overwhelming weight of authority it would be interpreted to mean a publication through, throughout, during the continuance of five full days: 3 Words and Phrases, 2858; 2 Words and Phrases (2d series), 594; *Northrop* v. *Cooper,* 23 Kan. 432; *Bacon* v. *Kennedy,* 56 Mich. 329 (22 N. W. 824); *Wilson* v. *Thompson,* 26 Minn. 299 (3 N. W. 699); *State* v. *Cherry County,* 58 Neb. 734 (79 N. W. 825); *Dever* v. *Cornwall,* 10 N. D. 123 (86 N. W. 227); *Wilson* v. *Northwestern Mut. Life Ins. Co.,* 65 Fed. 38 (12 C. C. A. 505); *Finlayson* v. *Peterson,* 5 N. D. 587 (67 N. W. 953, 57 Am. St. Rep. 584, 33 L. R. A. 532); 19 Cyc. 1104. The words "not less than," like the language "at least," signify "in the smallest or lowest degree; at the lowest estimate"; and legislation prescribing "not less than" or "at least" a specified number of days is usually construed to mean clear and full days for the specified period of time: 5 Words and Phrases, 4833; 3 Words and Phrases (2d series), 631; *In re Gregg's Estate,* 213 Pa. 260 (62 Atl. 856); *Canadian Canning Co.* v. *Fagan,* 12 B. C. 23; *Reg.* v. *Aberdare Canal Co.,* 14 Q. B. 854 (68 E. C. L. 854); *Mitchell* v. *Foster,* 12 A. & E. 472 (40 E. C. L. 238); *Chambers Elec. L. & P. Co.* v. *Crowe,* 5 D. L. R. 545; *Ward* v. *Walters,* 63 Wis. 39 (22 N. W. 844); 5 C. J. 1438. Emphatic as is the word "for"

it is, if possible, made still more emphatic by the accompanying language "not less than"; and when combined these words unmistakably mean that the notice must be published for a period of time which cannot be less than five full successive days. In brief, the notice must be published five full days before the right to submit bids is closed.

3. We are relieved from the necessity of inquiring about the common-law rules for computing time because Section 531, L. O. L., prescribes the rule that is to be followed in this jurisdiction. That section reads thus:

"The time within which an act is to be done, as provided in this code, shall be computed by excluding the first day and including the last, unless the last day fall upon Sunday, Christmas, or other nonjudicial day, in which case the last day shall also be excluded. The time for the publication of legal notices shall be computed so as to exclude the first day of publication, and to include the day on which the act or event of which notice is given is to happen, or which completes the full period required for publication."

Quoting only such part of the section as is directly applicable it reads thus:

" * * The time for the publication of legal notices shall be computed so as to exclude the first day of publication, and to include the day * * which completes the full period required for publication."

Applying this statute to the record presented by this appeal June 5th must be excluded in computing the period of time prescribed by the charter and the whole of June 10th would be necessary to make the full period of five days; and therefore the notice for bids was not published in conformity with the charter. The published notice expressly stated that the bids would be opened on or after June 10th, and they were

in fact opened on that day. The notice had not been published for the period of time required by the charter when the time is measured and computed by a statute that has served as the guide not only in actions and suits but also in other proceedings: *Rynearson* v. *Union County*, 54 Or. 181, 183 (102 Pac. 785); *Boothe* v. *Scriber*, 48 Or. 561 (87 Pac. 887); *McCabe-Duprey Tanning Co.* v. *Eubanks*, 57 Or. 44 (102 Pac. 795, 110 Pac. 395); *Grant* v. *Paddock*, 30 Or. 312 (47 Pac. 712); *State ex rel.* v. *Macy*, 82 Or. 81 (161 Pac. 111). The right to offer bids should have been kept open until the end of June 10th, and the bids should not have been opened until June 11th.

If it be supposed that the charter required that the notice for bids be given "by publication for not less than five (5) successive weeks" in either a daily or a weekly newspaper it is fair to assume that, in the light of our statute and judicial precedents, it would be conceded that the day on which the first publication issued would be excluded in computing the period of five successive weeks. The fact that the charter mentions days rather than weeks does not render Section 531, L. O. L., any the less applicable. The charter does not merely say that the notice shall be published five times, but the dominant command is that the notice shall be published throughout a full period of not less than five whole days. The time of the day upon which a paper is issued is usually at some hour after the beginning of that day, and this is one of the circumstances that prompts the enactment of statutes like Section 531, L. O. L.

4. The city argues that even though it be decided that the notice was not published the full time required by law, nevertheless the plaintiffs have not shown that other and additional bids were prevented or that the

property owners suffered any injury. This, however, is a proceeding *in invitum* "in favor of which" as said by Mr. Chief Justice McBRIDE in *Evans* v. *Meridian Investment and Trust Company, ante,* p. 246 (163 Pac. 1165), decided April 3, 1917, "no equities have ever been declared by this or any other court." When a notice for bids is not published in conformity with the requirements of the charter it is not so much a question of what was done as it is one of what could have been done. The main purpose of the notice for bids is to promote competition and to secure to the taxpayers the benefit of such competition, and as said in *Matter of Pennie,* 108 N. Y. 364, "we are not at liberty to say that a taxpayer is not aggrieved by the omission" to publish the notice for the full period specified by the charter. The assessment attempted to be levied is invalid on account of the defect in the publication of the notice for bids and the decree is therefore affirmed.

AFFIRMED. REHEARING DENIED.

MR. CHIEF JUSTICE MCBRIDE, MR. JUSTICE BEAN and MR. JUSTICE MCCAMANT concur.

Denied June 19, 1917.

ON PETITION FOR REHEARING.

(164 Pac. 1184.)

On petition for rehearing. Rehearing denied.

Mr. Bert W. Macy, City Attorney, *Mr. Grant Corby, Mr. William H. Trindle, Mr. H. D. Roberts, Mr. Rollin K. Page* and *Mr. Woodson T. Slater,* for the petition.

Mr. Claire M. Inman and *Mr. John H. Carson, contra.*

Department 2. Statement by MR. JUSTICE HARRIS.

5. In a petition for a rehearing filed in this and in the companion case of *Albert* v. *Salem,* the city contends that Section 531, L. O. L., does not apply to the measurement of time for the publication of notices by cities or towns. The petitioner relies upon *Chung Yow* v. *Hop Chung,* 11 Or. 220, 221 (4 Pac. 326). The case cited is not applicable, for it refers to what is now known as Section 539, L. O. L., a provision relating to the proof of the service of notices. As pointed out in the original opinion Section 531, L. O. L., has served as the standard by which to measure time not only in actions and suits but also in other proceedings. Notable illustrations may be found in *Rynearson* v. *Union County,* 54 Or. 181 (102 Pac. 785); and in *State ex rel.* v. *Macy,* 82 Or. 81 (161 Pac. 111). To refuse to abide by the standard fixed by that statute would be to ignore a rule that is firmly established by precedents.

The remainder of the argument found in the petition proceeds upon the theory that we held that the notice should have appeared in six successive issues of a daily newspaper. We did not rule that the charter required the notice to be printed and to appear in six successive issues of the newspaper.

The original opinion points out that Section 26 of the charter embraces two elements: (1) The period of publication; and (2) the manner of publication. The period of publication is measured by applying the rule established in Section 531, L. O. L. This rule excludes the first day of publication in determining the period of time. For example, if a statute directed the publication of a notice for at least one week in a weekly newspaper it would not be necessary to print the notice

in two successive issues of the weekly newspaper; and while one printing and one appearance of the notice would be enough, nevertheless the day on which the paper was actually printed and issued would not be counted in measuring the one week required. Again, if a statute required that a notice be published for not less than five successive weeks in a weekly newspaper it would not be necessary for the notice to appear in six weekly issues, although as stated in the original opinion it is fair to assume that all would concede that the day of the first publication would be excluded in computing the period of five successive weeks. The rule that is applicable to weeks is likewise applicable to days. Our conclusions in the instant case are not out of joint with *Payette-Oregon S. Irr. Dist.* v. *Peterson,* 76 Or. 630, 635 (149 Pac. 1051); but on the contrary our conclusions here are in harmony with *O'Hara* v. *Parker,* 27 Or. 156 (39 Pac. 1004), as well as every other analogous precedent in this jurisdiction. In the original opinion it is distinctly stated,—not that the notice should have appeared in the sixth issue of the newspaper—but that "The right to offer bids should have been kept open until the end of June 10th, and the bids should not have been opened until June 11th." The petitions for a rehearing are denied.

REHEARING DENIED.

MR. CHIEF JUSTICE MCBRIDE, MR. JUSTICE BEAN and MR. JUSTICE MCCAMANT concur.

Argued March 20, affirmed April 10, rehearing denied June 19, 1917.
Mandate recalled for correction July 3, 1917.

ALBERT *v.* CITY OF SALEM.

(164 Pac. 569.)

From Marion: WILLIAM GALLOWAY, Judge.

This is a suit by J. H. Albert against the City of Salem. From a decree in favor of plaintiff, the defendant appealed. Affirmed. Rehearing denied.

For appellant there was a brief over the names of *Mr. Bert W. Macy*, City Attorney, *Mr. Grant Corby, Mr. William H. Trindle, Mr. Harold D. Roberts, Mr. Rollin K. Page* and *Mr. Woodson T. Slater*, with oral arguments by *Mr. Macy* and *Mr. Corby*.

For respondent there was a brief over the names of *Mr. John H. Carson, Mr. Claire M. Inman* and *Mr. John A. Carson*, with oral arguments by *Mr. Inman* and *Mr. John H. Carson*.

Department 2. MR. JUSTICE HARRIS delivered the opinion of the court. The plaintiff owns property adjacent to South 12th Street in the City of Salem and brought this suit for the purpose of canceling a local assessment which the city attempted to levy on his property to pay for the cost of paving a portion of the street. A trial in the Circuit Court terminated in a decree for the plaintiff. The appeal prosecuted by the defendant embraces the same improvement and assessment that were involved in *Watson* v. *Salem, ante*, p. 666 (164 Pac. 567, 164 Pac. 1184), and since the ruling made in that case is controlling here it necessarily

follows that the decree of the Circuit Court must be affirmed. AFFIRMED. REHEARING DENIED.

MR. CHIEF JUSTICE MCBRIDE, MR. JUSTICE BEAN and MR. JUSTICE MCCAMANT concur.

Argued May 7, modified and remanded May 29, rehearing denied July 3, 1917.

SEAWEARD v. FIRST NAT. BANK.

(165 Pac. 232.)

Mortgages—Foreclosure—Judgment—Conclusiveness.

1. Where, in a suit to foreclose a conveyance treated as a mortgage, the Supreme Court decreed strict foreclosure, to be avoided upon payment of the amount due within 90 days, defendants did not lose their right to recover rents and profits collected by the mortgagee pending the appeal by failing to apply to the trial court when the mandate was sent down to have the amount of such rents and profits credited on the sum to be paid for redemption, as the determination of that issue would have been equivalent to the institution of an action at law, and the defendants, having only 90 days within which to redeem, were not required to speculate upon the trial of such issue.

Judgment—Pleading Former Adjudication—Sufficiency.

2. In a suit to foreclose a conveyance treated as a mortgage, the judgment was modified on appeal so as to deny attorney's fees. Thereafter the mortgagor's assignee sued to recover rents and profits collected by the mortgagee pending the appeal, and the mortgagee pleaded the decree in the foreclosure suit in bar, setting forth copies of the pleadings, decree, mandate, etc., as exhibits. By way of recoupment and counterclaim the mortgagee sought to recover attorney's fees and certain other expenses. The reply alleged that the question whether defendant was entitled to recover the sum so claimed ought to have been litigated in the former action, and referred to the exhibits attached to the answer, thereby making such exhibits a part thereof and alleged that by reason of such adjudication defendant was estopped from claiming such sums. *Held*, that the reply was sufficient in details to present the question of former adjudication.

Judgment—Conclusiveness—Persons Concluded.

3. A judgment or decree is conclusive, not only on those who are parties to the action or suit, but also on all persons in privity with them.

[As to the conclusiveness of a judgment upon persons not parties to the action, see note in 2 Am. St. Rep. 876.]

Judgment—Conclusiveness—Identity of Causes.

4. The test of identity of causes as bearing upon the question of *res judicata* is the identity of the facts essential to their maintenance.

Judgment—Conclusiveness—Parties Concluded.

5. Where, in a mortgage foreclosure suit, attorney's fees were denied on appeal, the judgment was conclusive in a subsequent action by the mortgagor's assignee against the mortgagee in which the mortgagee counterclaimed for and sought to offset such attorney's fees, and no sum could be allowed or offset for such fees.

Pledges—Care of Property—Reimbursement.

6. Mortgagees assigned the mortgage and secured notes to a bank as collateral security for a debt. The mortgagors were unable to pay and conveyed the land to the bank, taking an option to repurchase, which they did not exercise. The bank canceled the notes and mortgage and surrendered them. An option to repurchase was subsequently given the mortgagees, who failed to exercise it, and the bank foreclosed, treating the conveyance to it as a mortgage. The bank had taken possession of the land and received the rents, issues, and profits, and the mortgagees sued to recover rents and profits received subsequent to the decree in the foreclosure suit. *Held*, that the bank was entitled to an allowance of sums paid by it in caring for and superintending the management of the farm under the general rule that a trustee, though not entitled to compensation for services performed personally in discharging the trust, may recover the reasonable value of services of others employed by him.

From Malheur: DALTON BIGGS, Judge.

In Banc. Statement by MR. JUSTICE MOORE.

This is an action by J. H. Seaweard against the First National Bank of Ontario, Oregon, a corporation, to recover $2,614.16 as money had and received to the use of T. M. Seaweard and E. F. Seaweard, partners as Seaweard Brothers, which claim is alleged to have been assigned to the plaintiff. This action is a continuation of the suit of the *First National Bank* v. *Seaweard*, 78 Or. 567 (152 Pac. 883). The facts there set forth and here involved are to the effect that about January 1, 1911, T. M. Seaweard and E. F. Seaweard sold and conveyed a farm in Malheur County, Oregon, to Emil E. Dean, Earl M. Dean, and A. M. Johnston, who as part consideration therefor gave the vendors four promissory notes of $5,000 each, and secured the

payment thereof by a mortgage of the farm. T. M. Seaweard and E. F. Seaweard, on February 14, 1913, were indebted to the defendant herein on their matured promissory notes in the sum of $14,437.23, to secure which they assigned as collateral and pledged to an officer of the bank the notes for $20,000 and the mortgage securing them. Being unable to pay the matured installments of these obligations the makers thereof and their wives, on February 21, 1913, executed a deed of the farm to an officer of the bank, who took the title in trust for his principal and gave the vendors last named an option to repurchase the land on or before May 24th of that year by paying the amount of the notes for $20,000, together with the taxes and other expenses which the bank might incur in operating the farm, whereupon the four notes were marked "Paid," the mortgage canceled, and these instruments surrendered to the makers. The officers of the bank then took possession of the farm with the right to receive the rents, issues, and profits thereof. The option referred to not having been exercised the officers of the bank executed to T. M. Seaweard and E. F. Seaweard an option to repurchase the farm on or before November 1, 1913, upon the payment of their indebtedness to the bank, the taxes, and the expenses of keeping the premises in repair. The latter option not having been exercised the bank commenced a suit against T. M. Seaweard, E. F. Seaweard, Emil E. Dean, Earl M. Dean, and A. M. Johnston, and the wife of each, treating the conveyance of the farm to an officer of the bank as a mortgage, alleging that such transfer was made pursuant to an agreement with T. M. Seaweard and E. F. Seaweard, setting forth the latters' matured promissory notes, which stipulated for the payment of a reasonable sum as attorney's fees in case suit or

action was instituted to collect any part thereof, and praying a foreclosure of the lien created by the deed to an officer of the bank. The answer of T. M. Seaweard and E. F. Seaweard denied that such conveyance was executed with their consent, and for a further defense alleged substantially that the notes for $20,000 and the mortgage securing them were pledged as collateral to the bank, which converted them to its own use, thereby becoming liable for the payment of such obligations, less, however, the indebtedness of T. M. Seaweard and E. F. Seaweard to the bank, aggregating $15,485.72, which sum was tendered in satisfaction of their matured notes but upon condition that the bank deliver to them the notes for $20,000 and the mortgage securing them, which, it will be remembered, had been surrendered to the makers. The reply controverted the allegations of new matter in the answer, and the cause being at issue was tried resulting in a decree as prayed for in that complaint awarding to the bank a recovery of its indebtedness against T. M. Seaweard and E. F. Seaweard and $1,500 as attorney's fees provided for in their promissory notes, and they appealed. After a trial in this court that decree was modified by disallowing any sum as attorney's fees and ordering that unless within 90 days from the entry of the mandate in the lower court T. M. Seaweard and E. F. Seaweard paid to the bank the amount of their indebtedness to it, less $15,485.72, the sum so tendered, and $334.24, which had been obtained by the officers of the bank in operating the farm, the lien of the deed of the premises should be foreclosed, but in case such payment was made a deed should be executed by the holder of the legal title to T. M. Seaweard and E. F. Seaweard: *First Nat. Bank* v. *Seaweard,* 78 Or. 567 (152 Pac. 883). The amount so specified was paid

within the time limited, whereupon a demand was made upon the bank for the payment of $2,614.16, which sum it had received in the year 1915 and during the pendency of the appeal, as rents, issues, and profits of the farm. Upon a refusal to pay any part of that sum this action was instituted.

The answer herein denies the material averments of the complaint, sets forth the facts hereinbefore stated, and for a further defense and by way of counterclaim alleges, in effect, that in operating the farm during the year 1915 the bank was entitled to $78.42 for caring for the premises; that it had paid out $212.15 for taxes, repairs, etc.; that in the suit to foreclose the lien the bank had been obliged to employ attorneys, to whom it paid $1,500, and had also disbursed the further sum of $350.05 as expenses incurred in that suit, the prosecution of which was necessitated by the failure and refusal of T. M. Seaweard and E. F. Seaweard to pay their indebtedness to the defendant, all of which facts the plaintiff knew when he took an assignment of the claim here sued upon. For a second defense and by way of offset the facts hereinbefore detailed are substantially repeated, and it is averred, in effect, that in the decree foreclosing the lien all accounts between T. M. Seaweard and E. F. Seaweard and the bank were considered and finally determined, and the decree rendered in that suit bars the maintenance of this action, setting forth copies of the pleadings, decree, mandate, etc., therein, and making them a part of the answer, designated as exhibits "A," "B," "C," "D," and "E." For a third defense and by way of recoupment the facts hereinbefore specified are reiterated, and it is alleged generally that at all the time the possession of the farm was held by the bank it was entitled to $78.42 for caring for the premises;

that it paid out $212.15 as taxes and for repairs, etc.; that in the suit to foreclose the lien the bank was compelled to pay $1,500 as attorney's fees and also to disburse $350.05 as expenses in prosecuting that suit, amounting to $2,140.62, which outlay could have been avoided if T. M. Seaweard and E. F. Seaweard had paid their obligations to the banks, and that all such facts were known to the plaintiff when he took an assignment of the claim referred to.

The reply put in issue all the averments of new matter in the answer, except the payment of $212.15 for taxes, etc., for which sum it is admitted a credit should be allowed. The reply in referring to the exhibits set forth in the answer contains a paragraph, the material part of which reads:

"Plaintiff admits that said defendant paid out the sum of $1,500 for attorney fees, and the sum of $350.05 for court costs, filing fees, transcript, taking of testimony, printing bills and other incidental expenses of said litigation in said Bank-Seaweard case, all of which are the same sums referred to in defendant's first answer and defense, and denies that by reason of acts therein complained of, defendant was damaged in the sum of $1,850.05, or any other sum whatsoever, and alleges that the question whether or not the defendant was entitled to recover said sum of $1,500 for attorney fees or any part thereof, and said sum of $350.05 or any part thereof, was and ought to have been litigated in said Bank-Seaweard case, and the plaintiff hereby refers to exhibits 'A,' 'B,' 'C,' 'D,' and 'E' attached to the said affirmative answer and defense of defendant to plaintiff's complaint, and hereby makes said exhibits and each thereof a part hereof, and alleges that by reason of said adjudication defendant is and ought to be precluded and estopped from alleging or claiming any sums whatsoever as attorney fees and costs by reason of said litigation in said Bank-Seaweard case."

Based on these issues this case was tried, without the intervention of a jury, upon an agreed statement of facts, from which the court deduced conclusions of law to the effect that the plaintiff was entitled to recover from the defendant $2,614.16, the sum received by it in the year 1915 as rents, issues, and profits of the farm, against which the defendant was entitled to offset and recoup $1,500 as attorney's fees incurred in prosecuting the foreclosure suit, $212.15 paid out for taxes, repairs, etc., and $78.42 as compensation for caring for the farm, and that the defendant was entitled to the remainder with interest thereon from November 12, 1915. A judgment having been rendered in accordance with these findings, each party separately appeals. MODIFIED AND REMANDED.

For plaintiff-appellant there was a brief over the names of *Mr. Ralph W. Swagler* and *Mr. William H. Brooke,* with an oral argument by *Mr. Swagler.*

For defendant and cross-appellant there was a brief over the name of *Messrs. McCulloch & Wood,* with an oral argument by *Mr. Wells W. Wood.*

MR. JUSTICE MOORE delivered the opinion of the court.

1. It is maintained by defendant's counsel that when the mandate in the foreclosure suit was sent down an opportunity was presented to contest in the lower court the right of the bank to retain the sum of money which it had received as rents, issues, and profits of the farm in the year 1915, pending the appeal; but no advantage having been taken of that fitting occasion, and such fact having been set forth in the answer herein as a bar to a recovery, an error was committed in awarding

any part of that sum to the plaintiff. The decree in that suit having been for a strict foreclosure, to be avoided, however, upon the payment within 90 days from the entry in the lower court of our mandate of the amount due the defendant from T. M. Seaweard and E. F. Seaweard, it is possible that upon their application the time might have been enlarged and the decree opened so as to allow them to show, in case there was no conflict in respect thereto, the sum which was so received as rents and profits. Such leniency is not generally indulged and the party seeking redemption under a decree of that kind is required to pay the specified sum of money within the time limited: 2 Wiltsie, Mort. Foreclosure, § 977. In the case at bar a controversy existed as to the credits to which the defendant claimed it was entitled and should withhold from the money which it had received. This sum, it will be remembered, was obtained after the appeal was taken in the foreclosure suit, and for that reason the accounting therefor could not have been heard or determined in the trial of that cause unless it had been sent back for that purpose. The entry of our mandate in the lower court was tantamount to an exercise of a ministerial duty, and while possibly the decree might there have been opened for the purpose of crediting on account of the sum to be paid for redemption the money received as rents and profits pending the appeal, a dispute in respect to the remainder, if any, so to be applied existed, and the determination of that issue, would have been equivalent to the institution, as in this instance, of an action at law to recover money had and received to the use of T. M. Seaweard and E. F. Seaweard, the plaintiff's assignors. Such a remedy, though equitable in character, could not have been tried in a court of equity to which the case of the

First National Bank v. *Seaweard,* 78 Or. 567 (152 Pac. 883), pertained, unless such cause had been remanded for that purpose. Aside from this as the plaintiff was allowed only 90 days after the entry of the mandate within which to redeem the real property from the decree of a strict foreclosure he could not well afford to take the chances of speculating upon a trial of the issue in an action at law as to the amount of credit to which he was justly entitled by reason of the defendant's collection of the rents, issues, and profits of the farm during the year 1915 and pending the appeal, but was compelled to pay the entire sum demanded in order to protect his rights, and hence no error was committed in the respect alleged.

In the case of *First Nat. Bank* v. *Seaweard,* 78 Or. 567 (152 Pac. 883), it was held in effect that while a determination of the amount due the plaintiff from the defendants therein on their matured promissory notes was essential, requiring that copies of these obligations should be set forth in the pleadings and the originals offered in evidence, the foreclosure there involved was not based on such notes but upon the conveyance of the farm to an officer of the bank, wherein the deed was treated as a mortgage; and that the promissory notes for $20,000 having been marked "Paid" and surrendered to the makers no attorney's fee could be predicated even upon the latter negotiable instruments. For that reason the decree in the lower court in that suit allowing $1,500 as such fee was modified by denying a recovery of any sum for that purpose, and as a consequence of the conclusion thus reached by this court preventing that plaintiff from obtaining any part of the costs and disbursements which it had incurred in the prosecution of the suit:

Section 567, L. O. L.; *Spores* v. *Maude,* 81 Or. 11 (158 Pac. 169).

2–4. It will be borne in mind that the plea of *res judicata* put forth by the reply substantially shows that the foreclosure suit, wherein the defendant in this action was plaintiff and T. M. Seaweard and E. F. Seaweard, who assigned their claim to the plaintiff herein, were defendants, presented an issue as to the right of the bank to recover an attorney fee; that such controversy was ultimately decided on the merits January 18, 1916, by this court denying any relief therefor, which facts are to be inferred by setting out *in haec verba* the decree in that case, thereby supplying an averment to that effect: *Fowlkes* v. *State,* 14 Lea (Tenn.), 14. And that the question there considered and determined is the identical dispute here involved. Such statement is sufficient in details to present the question of former adjudication: 9 Ency. Pl. & Pr. 619; 23 Cyc. 1225. A judgment or decree is conclusive not only on those who were parties to the action or suit but also on all persons in privity with them: *Schuler* v. *Ford,* 10 Idaho, 739 (80 Pac. 219, 109 Am. St. Rep. 233, 3 Ann. Cas. 336). The test of identity of causes for the purpose of determining the question of *res adjudicata* is the identity of the facts essential to their maintenance: *Harrison* v. *Remington Paper Co.,* 140 Fed. 385 (5 Ann. Cas. 314, 3 L. R. A. (N. S.) 954, 72 C. C. A. 405). The allegations of new matter in the reply are deemed to have been controverted as upon a direct denial: Section 95, L. O. L. The stipulations of fact upon which this action was tried contains a clause to the effect that in the suit of the *First Nat. Bank* v. *Seaweard,* 78 Or. 567 (152 Pac. 883), plaintiff paid to its attorneys for their services $1,500, which was a reasonable sum for that purpose. Considering such agreed statement in

connection with the issue last referred to the trial court deduced the conclusion of law that the bank was not barred by the former decree from offsetting against the sum of money now sued for the payment so made as attorney's fees. An inspection of the exhibits mentioned discloses no uncertainty exists in respect to the identical question decided on the merits in that suit, which final determination is controlling herein as the law of the case, as much so in relation to such fee as to the costs and disbursements which the bank incurred in the prosecution of that suit: *Powell* v. *Dayton etc. R. Co.*, 14 Or. 22 (12 Pac. 83); *Thompson* v. *Hawley*, 16 Or. 251 (19 Pac. 84); *Murphy* v. *Albina*, 22 Or. 106 (29 Pac. 353, 29 Am. St. Rep. 578); *Kane* v. *Rippey*, 22 Or. 299 (29 Pac. 1005); *Portland Trust Co.* v. *Coulter*, 23 Or. 131 (31 Pac. 280); *Baker County* v. *Huntington*, 48 Or. 593 (87 Pac. 1036, 89 Pac. 144); *Baines* v. *Coos Bay Nav. Co.*, 49 Or. 192 (89 Pac. 371); *Oliver* v. *Synhorst*, 58 Or. 582 (109 Pac. 762, 115 Pac. 594); *State* v. *McDonald*, 59 Or. 520 (117 Pac. 281); *Meyer* v. *Livesley*, 61 Or. 55 (120 Pac. 749); *Benbow* v. *The James John*, 61 Or. 153 (121 Pac. 899); *Williams* v. *Pacific Surety Co.*, 70 Or. 203 (139 Pac. 934); *Hanna* v. *Alluvial Farm Co.*, 79 Or. 557 (152 Pac. 103, 156 Pac. 265).

5. The question of attorney's fees having been considered and finally determined by this court upon the merits on the former appeal the conclusion thus reached is binding upon the defendant herein, which was a party to that suit, and also upon T. M. Seaweard and E. F. Seaweard and their assignee, the plaintiff herein, who took the chose in action with knowledge of their rights in the premises. The allowance, therefore, of any sum as attorney's fees in this action must

be denied, and no offset against the sum sued for can be awarded for that purpose.

6. The plaintiff's counsel complain of the trial court's allowance of $78.42, or any other sum, as compensation to the defendant for its care of the farm during the pendency of the former appeal and while the bank held possession of the premises. It is argued that the pledgee in possession performed such service for its own benefit and not for the pledgors' advantage, and hence it is not entitled to any remuneration for such services. A pledgee is a trustee, and under the rule prevailing in England he is not allowed any compensation for labor or trouble bestowed upon the trust estate. Such rule, however, finds little favor in the courts of the several states of the Union, where it is generally held that the trustee cannot recover compensation for services which he personally performs in discharging the trust, but that when others are engaged by him for that purpose he may recover the reasonable value of the services so performed: *Gibson's Case* (1 Bland's Ch. (Md.) 138), 17 Am. Dec. 257, and notes. The legal principle thus stated is not in conflict with the rule announced in the case of *Caro* v. *Wollenberg*, 83 Or. 311 (163 Pac. 94), where it was ruled that services personally rendered by a trustee did not constitute a valid charge against the trust estate or the *cestui que trust*.

In the case at bar the defendant being a corporation could not personally care for or superintend the management of the farm, but was compelled to discharge that duty by others for the performance of whose services it is justly entitled to a reasonable compensation. The sum awarded for that purpose does not exceed the measure allowable, and hence it should not be disturbed.

It is conceded that the sum of $212.15 is a just claim for money paid out for taxes, repairs, etc., and was properly allowed as an offset against the sum of money received as rents. That sum and $78.42, the compensation for the care of the premises, aggregating $290.57, should, therefore, be deducted from $2,614.16 leaving $2,423.57 as due the plaintiff with interest at 6 per cent per annum from the time this opinion is handed down: *Baker County* v. *Huntington, supra; Sargent* v. *American Bank and Trust Co.*, 80 Or. 16, 39 (154 Pac. 759, 156 Pac. 431); *Hayden* v. *City of Astoria, ante*, p. 205 (164 Pac. 729).

The judgment herein will, therefore, be modified in the particulars specified, and under the amendment of Section 3 of Article VII of the Constitution the cause will be remanded for the purpose of entering such final determination. MODIFIED AND REMANDED.

Argued May 8, reversed June 6, rehearing denied July 3, 1917.

CAMP CARSON MINING CO. *v.* STEPHENSON.*

(165 Pac. 351.)

Injunction—Suit to Restrain Trespass—Title or Possession to Support Suit.

1. In a suit to enjoin trespass, prior possession of the premises constitutes *prima facie* evidence and affords sufficient strength of the plaintiff's title to entitle him to relief against a mere trespasser who entered without right.

[As to injunction against trespass on real estate, see notes in 11 Am. Dec. 498; 53 Am. Rep. 346; 99 Am. St. Rep. 731.]

Waters and Watercourses—Appropriation—Abandonment.

2. Under Section 5136, L. O. L., declaring that ditches and mining flumes permanently affixed to the soil are real estate, provided that,

*As to abandonment or loss of right of prior appropriators, see note in 30 L. R. A. 265. REPORTER.

when the owner shall cease to operate or exercise ownership for a period of five years, or shall remove from the state with the intent to change residence, and shall remain absent one year without using or exercising ownership, he shall be deemed to have lost all interest therein which was, impliedly, amended in respect to the period of limitation by Section 6571, L. O. L., providing that the right to appropriate water may be lost by abandonment, and that by failure or neglect to use same for a period of two years such water shall revert to the public and be subject to other appropriation, but the question of abandonment shall be one of fact to be tried and determined as to the questions of fact, where there was no evidence to explain or excuse the delay of a mining corporation for more than two years to use its ditch or flume or water thereby conducted, the corporation had abandoned its appropriation, and its trustee in bankruptcy could convey no right to defendants, who in entering such property were trespassers upon the property of plaintiff, who was in actual possession after appropriation, and further trespasses by defendants will be enjoined.

From Union: JOHN W. KNOWLES, Judge.

In Banc. Statement by MR. JUSTICE MOORE.

This is a suit to enjoin trespasses upon real property. The complaint states, in effect, that the plaintiff, Camp Carson Mining and Power Company, is an Oregon corporation and the owner and entitled to and in the possession of a group of placer mining claims, containing 1,440 acres of unpatented land, in Union County, Oregon, commonly known as the Camp Carson Mines, of which tract 290 acres are particularly described; that it is the owner of the right to use all the water of the Grande Ronde River, diverted at a point on the northwest quarter of the northwest quarter of section 23, in township 6 south of range 36 east of the Willamette Meridian, and conducted in a ditch and flume to a point near the center of section 15, in that township and range, where it is and for a long time has been used in operating mines; that the defendants, M. A. Stephenson and H. W. ReDell, in the fall of 1914 unlawfully tore down a house belonging to the plaintiff and converted the lumber to their own use; that on April 15, 1915, they unlawfully cut the dam, whereby

the water was diverted from the river into the ditch and flume referred to, and converted the lumber in the flume to their own use; that they unlawfully cut a ditch across a road owned by the plaintiff, and threaten to continue such trespasses.

The answer controverts the material averments of the complaint, and alleges, in effect, that the house referred to stood on their mining ground; that they were the owners of the ditch and flume mentioned and had the legal right to intermeddle therewith and to remove the lumber therefrom; and that the ditch which interfered with the road was dug on their own mining land and the excavation was covered with a bridge.

The reply put in issue the allegations of new matter in the answer, whereupon the cause was tried resulting in a decree dismissing the suit, and the plaintiff appeals. REVERSED. DECREE RENDERED.

For appellant there was a brief and an oral argument by *Mr. Turner Oliver.*

For respondent there was a brief and an oral argument by *Mr. James D. Slater.*

MR. JUSTICE MOORE delivered the opinion of the court.

The evidence shows that, on October 18, 1907, the Indiana Mining Company, an Oregon corporation, duly appropriated from the Grande Ronde River, at a point in the northwest corner of section 23, in township 6 south of range 36 east of the Willamette Meridian, about 600 inches of water, miner's measurement, which was conducted northwesterly by means of a ditch and flume and used in section 9 of that township and range in operating a quartz-mill on land known as the Golden Star Mine. The Grande Ronde Milling and Power

Company, an Oregon corporation, on January 29, 1910, and March 4th of that year, filed amended notices of location of mining claims, showing a selection of 360 acres of land in section 15 and 60 acres in section 10, in the township and range specified, which location seems to conflict with that of the Indiana Mining Company. The latter corporation, on November 1, 1910, executed to Burt German a deed conveying *inter alia*

"those certain quartz mining claims known, located and recorded as the Golden Star, Mayflower, Wallowa, and Leasia, situated on the Grande Ronde River, about one mile above the mouth of Clear Creek in what is known as the Camp Carson Mining District in Union County, Oregon. * * Also that certain ditch and water right connected therewith, which said ditch taps the Grande Ronde River and diverts water therefrom, on section 9, township 6 south, range 36 east, Willamette Meridian, which said ditch and water right is used for power purposes in operating the machinery connected with said mining property."

Burt German and his wife, on November 16, 1910, executed to the Hot Springs Copper Company, an Oregon corporation, a deed conveying to it *inter alia* the property last above described. The latter corporation was, on May 22, 1912, duly adjudged to be a bankrupt by consideration of the federal court of Oregon, and W. A. Shoemaker was appointed and duly qualified as trustee for the estate.

August Hug, as sheriff of Union County, Oregon, on April 29, 1913, by virtue of a decree and order of sale issued in a suit foreclosing miners' liens wherein H. A. Shropshire was plaintiff and the Oregon Mining and Milling Company and the Grande Ronde Mining and Power Company, corporations, were defendants, sold at public auction to that plaintiff the property of the defendants known as the Camp Carson Mines, in sec-

tions 4, 5, 9, 10, 15, 16, 21, 22, and 28, in township 6 south of range 36 east of the Willamette Meridian.

W. A. Wilson and Frank F. Turner, on June 15, 1914, filed a notice of appropriation of 1,000 inches of water, miner's measurement, from Grande Ronde River, to be diverted at the northwest corner of section 23, in that township and range, and conducted by a ditch and flume to a point on Tanner Creek near the center of section 15 in such township. The notice contained a clause as follows:

"And it is the intention of the undersigned to use as far as possible the old Indiana ditch, now abandoned."

H. A. Shropshire, on August 12, 1914, executed to H. T. Harvey a deed of all the property so conveyed to him by the sheriff of Union County, Oregon, particularly describing each tract of land and the water right used in connection therewith. H. T. Harvey and wife, on August 31, 1914, deeded to the Camp Carson Mining and Power Company, the plaintiff herein, all of such property. The plaintiff, on September 24, 1914, applied to the state water board of Oregon to appropriate from the Grande Ronde River water to be used on its mining claims and conducted in the ditch and flume constructed by the Indiana Mining Company.

W. A. Wilson and Frank F. Turner, on September 30, 1914, executed to the plaintiff a deed transferring all their right to the use of the water of the river which was initiated by the notice given by them June 15th of that year.

W. H. Shoemaker, the trustee in bankruptcy of the Hot Springs Copper Company, pursuant to authority of the referee and in consideration of $50, of which $30 was evidenced by a promissory note, executed to the defendants herein, on October 31, 1914, a deed pur-

porting to transfer all the bankrupt's right in and to the ditch and flume constructed by the Indiana Mining Company.

The foregoing comprises a brief statement of the muniments of title of the respective parties which were received in evidence and have been arranged in chronological order. It is maintained by defendant's counsel that the decree rendered in the suit to foreclose the miners' liens and the order of sale issued thereon, whereby the sheriff of Union County, Oregon, undertook to sell and convey to H. A. Shropshire the mining property described in some of these conveyances, was ineffectual for any purpose, and that this being so, the plaintiff is not entitled to equitable intervention.

It will be remembered that this is a suit to enjoin alleged trespasses committed upon real property of which the plaintiff was in the undisputed possession, asserting ownership and securing the occupancy thereof by a conveyance of the land, no part of which is claimed by either of the defendants, except 60 acres hereinafter specified. In *Ricard* v. *Williams*, 7 Wheat. (U. S.) 59, 107 (5 L. Ed. 398), it was held that the possession of land by a party claiming it as his own in fee was *prima facie* evidence of his ownership and seisin of the inheritance. In deciding that case Mr. Justice STORY says:

"For the law will never construe a possession tortious unless from necessity. On the other hand, it will consider every possession lawful, the commencement and continuance of which is not proved to be wrongful. And this upon the plain principle that every man shall be presumed to act in obedience to his duty, until the contrary appears. When, therefore, a naked possession is in proof unaccompanied by evidence, as to its origin, it will be deemed lawful and co-extensive with the right set up by the party."

1. In a controversy before a judicial tribunal relating to land, prior possession of the premises constitutes *prima facie* evidence and affords sufficient strength of the plaintiff's title to entitle him to relief against a mere trespasser who entered without right: *McEwen* v. *City of Portland,* 1 Or. 300; *Oregon Ry. & Nav. Co.* v. *Hertzberg,* 26 Or. 216 (37 Pac. 1019); *Browning* v. *Lewis,* 39 Or. 11 (64 Pac. 304); *Sommer* v. *Compton,* 52 Or. 173 (96 Pac. 124, 1065); *Todd* v. *Pac. Ry. & Nav. Co.,* 59 Or. 249 (110 Pac. 391, 117 Pac. 300); *Carroll* v. *McLaren,* 60 Or. 233 (118 Pac. 1034); *Friendly* v. *Ruff,* 61 Or. 42 (120 Pac. 745); *Kingsley* v. *United Rys. Co.,* 66 Or. 50 (133 Pac. 785); *Parker* v. *Wolf,* 69 Or. 446 (138 Pac. 463).

2. It is unnecessary to consider the decree in the suit to foreclose the miners' liens, pursuant to which possession by mesne conveyances was given to the plaintiff, and such being the case it is entitled to maintain this suit against the defendants, whose answer does not controvert such right of possession, except as to 60 acres of mining land.

The testimony shows that the plaintiff having obtained a deed of the mining claims immediately commenced cleaning out a part of the old Indiana ditch, beginning at the point of diversion, and about September 30, 1914, or a month before the defendants secured their deed from the trustee in bankruptcy, conducted by means of such ditch and flume water from the Grande Ronde River to a point near the center of section 15, in the township and range mentioned, where the volume was used in operating machinery employed to save the fine gold. The defendants, in April, 1915, relying upon the validity of their deed executed by the trustee in bankruptcy, prevented water from flowing into the ditch and removed from the flume, forming a part of

the conduit, lumber, which they took to their mining claims, consisting of 60 acres, thereby precipitating this suit.

The question to be considered is whether or not the Indiana Mining Company had abandoned its right to the ditch and flume, or its grantee the Hot Springs Copper Company had forfeited its right thereto, so that the latter's trustee in bankruptcy had no title or estate in or to the conduit which he could sell or convey. The testimony discloses that the Indiana Mining Company, pursuant to the notice of October 18, 1907, constructed the ditch and flume referred to, from the Grande Ronde River northwesterly to its mines and used the water thus diverted from that stream in operating a quartz-mill. The extraction of gold by such means could not have been very profitable, for the work ceased in the year 1908, and was never thereafter resumed. Evidently the Indiana Mining Company, in order to protect its interest in the ditch and water right, caused some work to be done on its property after it quit operating the quartz-mill. Thomas Loftus, in referring thereto, testified that in the year 1909 or 1910 he was employed in behalf of that corporation by William Muir:

"Q. And what particular work were you and Mr. Muir doing?

"A. We fixed up that Indiana ditch and turned water into it. * * We were just prospecting to see if we couldn't find some trace of a ledge that had been lost, or something like that. * *

"Q. How long did Mr. Muir stay there on the ditch?

"A. Oh, it took quite a while to clean it out all the way—was something like three weeks, and I guess we used it about a week after we got the water."

This witness, referring to some machinery which he saw, testified: "It was there in the mill." Alluding to

Mr. Muir and to the Indiana Mining Company, Mr. Loftus stated on oath:

"He told me after the machinery was moved out that he wasn't in charge of it any longer; that they dismissed him."

This witness was unable accurately to state in what year he assisted in performing such work, for on cross-examination, he testified in respect thereto: "It might have been 1911. It was along there."

In speaking of the ditch Mr. Loftus stated upon oath:

"It might have been in use in 1910, but no later than that that I know of."

He further testified that the work which Mr. Muir and he rendered was performed in August and September.

John McIlroy testified that the services so performed were furnished in the year 1910, but that in the next year he worked with Mr. Muir 49 days doing assessment work for the Indiana Mining Company, and that the quartz-mill was taken away from the mines in the fall of 1911. The defendant, M. A. Stephenson, corroborates such testimony in respect to the time of removing the machinery.

When it is remembered that the Indiana Mining Company, on November 1, 1910, sold and conveyed to Burt German all its mining claims, water rights, mills, machinery, etc., and thereafter, so far as it can be determined from the evidence before us, had no interest in the property, it would seem that Mr. McIlroy and Mr. Stephenson had unintentionally erred in concluding that the last assessment work had been performed on such mining claims in the year 1911. Mr. McIlroy does not state, however, what month during that year he assisted in doing the assessment work

for the Indiana Mining Company. No work whatever appears thereafter to have been done on such mining grounds until the plaintiff's agents, in September, 1914, took possession of the ditch and flume, and about the 30th of that month turned into such conduit water, which was carried to a point near the center of section 15, in the township and range mentioned, where it was used for mining purposes. Giving to the testimony of Mr. McIlroy full credit as to the year when he assisted in doing such assessment work a period of three full years had elapsed before any other labor or service was performed or any money or material was furnished in making improvements upon any of the mining property; and this being so, had the water right together with the ditch and flume been abandoned when plaintiff's agents took possession thereof in September, 1914? As we understand the decision of the trial court was founded upon the limitation prescribed by Section 5136, L. O. L., which reads:

"Ditches and mining flumes, permanently affixed to the soil, are hereby declared to be real estate; *provided,* that whenever any person, company, or corporation, being the owner of such ditch, flume, and the water right appurtenant thereto, shall cease to operate or exercise ownership over said ditch, flume, or water right, for a period of five years, and every person, company, or corporation who shall remove from this state with the intent or purpose to change his or its residence, and shall remain absent one year without using or exercising ownership over such ditch, flume, or water right, shall be deemed to have lost all title, claim, and interest therein."

This provision is Section 9 of a statute enacted October 14, 1898 (Laws Or. 1898, p. 16), and is entitled, "An act relating to mining claims," etc. As thus quoted the language employed was impliedly amended

in respect to the period of limitation by Section 20 of a statute approved February 18, 1899 (Laws Or. 1899, p. 172), entitled, "An act to provide for the appropriation of water from the lakes and running streams of the State of Oregon for the purpose of developing the mineral resources of the state, and for other purposes," etc., which provisions are incorporated in Section 6571, L. O. L., and read:

"The right to appropriate water hereby granted may be lost by abandonment; and if any persons, companies, or corporations constructing a ditch, canal, flume, or pipe line under the provisions of this act shall fail or neglect to use the same for a period of two years at any time, it shall be taken and deemed to have abandoned its appropriation, and the water appropriated shall revert to the public and be subject to other appropriations in order of priority; but the question of abandonment shall be one of fact, to be tried and determined as other questions of fact."

In *Pringle Falls Power Co.* v. *Patterson,* 65 Or. 474, 486 (128 Pac. 820, 132 Pac. 527), Mr. Justice BEAN, adverting to the appropriation of water to a beneficial use and referring to the section of the statute last set forth and to the limitation thus prescribed, says:

"Such right may be extinguished by any act showing an intent to surrender or abandon the right, after which, if the person having the right ceases its use for the statutory period for abandonment, his interest is lost."

If the clause of Section 6571, L. O. L., "But the question of abandonment shall be one of fact to be tried and determined as other questions of fact," be construed as creating only a disputable presumption, no testimony was given at the trial tending in any manner to explain or excuse the delay of the Indiana Mining Company or its grantee, the Hot Springs Copper Com-

pany, for more than two years in using the ditch, flume, or water thereby conducted; and hence the latter corporation had abandoned its appropriation, and its trustee in bankruptcy conveyed no right to the defendants, who were and are trespassers upon the plaintiff's premises, the right to the possession of which is undisputed.

The evidence shows that a part of the mineral lands described in the complaint, to wit, the south half of the southeast quarter of the southwest quarter, the south half of the southwest quarter of the southeast quarter, and the west half of the southeast quarter of the southeast quarter of section 10, in township 6 south of range 36 east of the Willamette Meridian, containing 60 acres, was located by the defendants, and that the house which they tore down and removed the lumber therein to their claims stood upon such disputed tract. No testimony was offered tending to show which party had the superior right to this particular 60 acres of land, so that if the lumber had not been taken by the defendants no injunction would be issued to restrain the removal of such material because of a failure to establish a pre-existing right.

The alleged interference by the defendants with the road was only temporary, and as disclosed by the testimony they have built a bridge across the way, the travel along which was interrupted by the excavation of a ditch.

The decree will, therefore, be reversed and one entered here enjoining each of the defendants, his agents, and servants from interfering in any manner with the diversion of the waters of the Grande Ronde River at the point stated in the complaint or with the flow of the specified volume in the Indiana ditch or flume to the center of section 15, in the township and range speci-

fied, and from trespassing upon the plaintiff's premises, the right to the possession of which is undisputed.

REVERSED. DECREE RENDERED.
REHEARING DENIED.

MR. JUSTICE MCCAMANT and MR. JUSTICE BEAN took no part in the consideration of this case.

Argued May 8, modified June 6, rehearing denied July 3, 1917.

STUART *v.* CAMP CARSON MINING CO.*

(165 Pac. 359.)

Equity—Amendment of Complaint—After Submission of Case.

1. It was proper to allow plaintiff to amend complaint in equity suit to foreclose a mining lien after submission of cause, by attaching copy of notice of lien; the cause being considered upon its merits.

Equity—Amendment of Complaint—Liberal Rule.

2. The rule of amendment should be applied more liberally in equity suits than in actions at law.

Mines and Minerals—Liens—Recording of Claim—Compliance with Statute.

3. Where a claim of lien for work on mines was recorded in same book as mechanics' liens, and directly and indirectly indexed, this was sufficient compliance with Section 7446, L. O. L., providing that the county clerk shall record claims in a book kept for that purpose and indexed as deeds and other conveyances are required to be indexed, and Section 7421, providing substantially the same requirements for mechanics' liens.

Evidence—Books of Account—Necessity of Authentication.

4. Books of account offered in evidence must be authenticated by the oath of someone who made or directed the entry with authority, or, if this is not possible, by proof of handwriting.

Evidence—Books of Account—Authentication.

5. Witness' testimony *held* insufficient to authenticate time-book offered in evidence in mining lien foreclosure.

Mines and Minerals—Liens—Construction of Statute—"Labor."

6. "Labor" mentioned in miners' lien statute means actual physical labor unequivocally performed on the property.

[As to enforcement by miner of lien for work on mining claim, see note in 65 **Am. St. Rep.** 172.]

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*As to authentication of books of account and entries as affecting admissibility in evidence, see note in 52 **L. R. A.** 590. REPORTER.

Interest—Allowance—Necessity of Statutory Provisions.

7. Interest as such cannot be allowed on foreclosure of lien for work on mines, since the statute does not provide for it.

Mines and Minerals—Liens—Allowance of Attorney Fees—Combined Claims.

8. An attorney fee was properly allowed in a lump sum, although founded on several claims for mining liens assigned to plaintiff.

Mines and Minerals—Liens—Effect of Failure of Lien.

9. Failure of a mining lien in foreclosure proceedings does not necessarily involve validity of defendant's indebtedness to claimants.

From Union: JOHN W. KNOWLES, Judge.

This is a suit by E. J. Stuart against the Camp Carson Mining & Power Company, a private corporation, and others, to foreclose liens upon mining property of the defendant company. From a decree allowing a portion of plaintiff's demand, the mining company and Turner Oliver have appealed. Modified.

In Banc. Statement by MR. JUSTICE BURNETT.

The Camp Carson Mining & Power Company is a corporation said to have conducted a general mining and sawmill business on about 1,440 acres of unpatented placer mining ground in Union County, owning and possessing certain buildings thereon, together with ditches, flumes, and machinery used in operating the mines. For himself the plaintiff alleges in substance that he performed work and labor as a mechanic for the company upon the mining property at the agreed and contract price of $4 a day covering a certain number of days in April, May, and June, 1915, totaling $208.80, against which he allows a credit of $67.45 by supplies and cash, leaving a balance of $141.35. Then follows in the original complaint this allegation:

"That plaintiff performed the last of said labor and ceased to work on said property on the said 8th day of

June, 1915, and thereafter towit on the 22d day of July, 1915, duly prepared and verified his notice and claim of lien for the whole of said sum of $141.35, upon the whole of said described property, in the form and manner provided by law; and thereafter, towit on the 23d day of July, 1915, duly filed said notice and claim of lien in the office of and with the county clerk of Union County, State of Oregon, who then and there duly recorded said notice and claim of lien in Book D, Record of Mechanics' Liens of said county, at page 428 thereof, where said claim and notice of lien ever since has remained, and still remains so of record, that said record was and is a record kept by said clerk for the purpose of recording therein such liens, and that said clerk then and there duly indexed the record of said notice and claim of lien, in the manner and as deeds and other conveyances are required by law to be indexed."

He avers that no part of the above-mentioned balance has been paid by the company or anyone else and that the whole thereof remains due, together with interest thereon at the rate of 6% per annum from June 8, 1915, until paid; that he paid $4.20 for filing and recording the lien, and that the sum of $50 is a reasonable amount to be allowed him as attorney's fee for foreclosing the lien. He also declares as assignee on twenty-one other lien claims for labor performed and materials furnished to the defendant mining company by other parties. The form of pleading is the same in each count.

A general demurrer by the company and Turner Oliver, also defendant, against the original complaint having been overruled, they filed an answer denying all the allegations of each count except the corporate character of the company and its ownership of the property mentioned.

After all the testimony was in and the case had been finally submitted the court permitted the plaintiff to file an amended complaint. The change consisted in adding to the quoted allegation above set out in each count these words:

"A true copy of said notice of lien is hereunto attached, marked 'Exhibit A' and made a part of this amended complaint."

The answering defendants move to strike out the new pleading on the ground that it

"does not purport to add any name or to strike out the name of any party from the pleading, and does not purport to correct any mistake in the name of any party or a mistake in any other respect, and does not purport to make the pleading conform to any facts proved, but substantially changes the cause of action after the case has been tried and submitted, * * and the court has no jurisdiction to consider such pretended amended complaint nor any discretion to permit the same to be filed, and no motion was attached to said pretended amended complaint asking permission of the court to file the same."

This motion was overruled and afterwards the defendants who appeared answered the amended complaint as before, traversing it and setting up the title of Turner Oliver to the property by virtue of a foreclosure of mortgage upon the property.

The reply put in issue all the new matter. The court made findings of fact and conclusions of law followed by a decree which rejected the claims assigned to plaintiff by Rudolph F. Peterson, S. S. Somerville, Gordon Land, F. F. Turner (on his second claim), Mrs. J. R. Somerville, and Hans Olsen. It allowed a portion of the plaintiff's claim and sustained the demands of Axel Wengren, O. J. Burnett, Charles Denny, J. A.

Shira, F. F. Turner (on his first claim), Cecil Merrill, L. W. Becker, Christy Nelson, Earl Taylor, R. E. Lindley, Elmer Somerville, J. R. Somerville, W. W. Dill, La Grande Grocery Company, and Sawyer-Clark Company, some in full and others only in part. The mining company and Turner Oliver alone appealed, there being no complaint of the decree on the part of the plaintiff or the other defendants, the latter of whom defaulted. MODIFIED.

For appellants there was a brief and an oral argument by *Mr. Turner Oliver.*

For respondent there was a brief and an oral argument by *Mr. Francis S. Ivanhoe.*

MR. JUSTICE BURNETT delivered the opinion of the court.

1. The defendants assign as error the overruling of their demurrer to the original complaint and the action of the court in permitting the plaintiff to amend after the cause was submitted. Conceding that the original complaint was demurrable because it stated mere conclusions of law about the making and filing of the notice of lien, yet we may set it down as a defective statement of a cause of suit which might be aided by amendment. The matter in hand is not like *Golden Rod Milling Co.* v. *Connell,* 84 Or. 551 (164 Pac. 588), where we held that even in an equity suit the plaintiff had no right to amend his complaint after the cause had been submitted when the change involved the averment of a new and distinct cause of suit. The only attack made upon the new pleading of the plaintiff here was a motion to strike out the same which, being denied, the defendants answered it. It does not appear that the evidence re-

quired to support the second complaint was any different from that offered to prove the first. Neither is it apparent from the record that the defendants were deprived of any defense upon the merits or that they were denied any opportunity to take additional proof. For aught that the abstract discloses, the cause was considered upon its real merits under the issues formed by the amended pleadings.

2. This being an equity suit, heard and determined by the court, we think the rule of amendment should be applied more liberally than in the strict procedure of an action at law, and that unless the defendant mining company can show that its rights on the real merits were abused the error is negligible.

3. The defendants also complain that the court erred in admitting in testimony each of the twenty-two claims of liens, copies of which are attached to the amended complaint, for three reasons: a. That each of the notices fails to show that the contract of employment was made by anyone having authority to bind the defendant company; b. That each of the notices was recorded in the record of mechanics' liens and not in the record of miners' liens; c. It affirmatively appeared in the testimony that neither of said notices of lien was indexed as "deeds and other conveyances are required by law to be indexed"; and d. That it was clearly shown by the evidence that none of said claims for labor contained a true statement of claimant's demand after deducting all just credits and offsets, and each of them contained charges for matters and things other than for labor upon or in development of the mining property described in the complaint. It is required by Section 7446, L. O. L., that "the county clerk shall record said claim in a book kept for that purpose, which shall be indexed as deeds and other conveyances are re-

quired by law to be indexed. * * " In respect to what are commonly known as mechanics' liens, Section 7421, L. O. L., provides that "the county clerk shall record said claim in a book kept for that purpose, which record shall be indexed as deeds and other conveyances are required by law to be indexed." Substantially the same language is used in providing for the filing of liens for laborers' wages due from any concern put in the hands of a receiver: Section 7441, L. O. L. The testimony in this case coming from the county clerk is to the effect that the book in which the claims in question were recorded was one kept for that purpose, although in the same volume mechanics' liens were likewise recorded, and that in the book there was a direct and indirect index citing the page whereon each claim was inscribed. This point is ruled against the contention of the defendants in *Slover* v. *Bailey,* 49 Or. 426 (90 Pac. 665). Mr. Chief Justice BEAN there says:

"Where the book in which a particular instrument shall be recorded is prescribed by law, it must be recorded in such book; but, where no particular book is designated, recording it in any book kept by the officer for that purpose is sufficient," citing authorities.

Other precedents are these: *Ivey* v. *Dawley,* 50 Fla. 537 (39 South. 498, 7 Ann. Cas. 354); *Faragee* v. *McKerrihan,* 172 Pa. St. 234 (33 Atl. 583, 51 Am. St. Rep. 734); *Switzer* v. *Knapps,* 10 Iowa, 72 (74 Am. Dec. 375); *Mee* v. *Benedict,* 98 Mich. 260 (57 N. W. 175, 39 Am. St. Rep. 543, 22 L. R. A. 641).

In *Osborn* v. *Logus,* 28 Or. 302 (37 Pac. 456, 38 Pac. 190, 42 Pac. 997), it was held in substance that it was unnecessary for the notice of lien in terms to connect the claimant with the owner in a contract relation. It was deemed sufficient to follow the words of the statute, but that case does not dispense with the necessity of

establishing such a relation as a matter of pleading and proof at the trial either directly or through an agent who may be such by virtue of the enactment or by appointment of the owner: See also *Smith* v. *Wilcox*, 44 Or. 323 (74 Pac. 708, 75 Pac. 710); *Litherland* v. *Cohn Real Est. Co.*, 54 Or. 71 (100 Pac. 1, 102 Pac. 303); *Equitable Savings & Loan Assn.* v. *Hewitt*, 55 Or. 329 (106 Pac. 447). In form we consider the notices sufficient and the manner of indexing them complies substantially with the directions of the statute in that a means is provided whereby anyone searching the book for a record of liens is directed by the index to the page where he may obtain the information desired. The other objection requires an examination of the evidence.

The principal question in the matter of testimony hinges upon a time-book introduced in evidence by the plaintiff. This was produced by a witness, W. W. Dill, and he alone gives to it whatever of authenticity it may have. Called upon to testify about the length of time the men were at work and when they quit, he said:

"Well, I would have to go to the data because I can't remember it.

"Q. Now, this data you speak of, state what that is.

"A. Why, I have the time-book of the company.

"Q. State whether you had anything to do with the keeping of the time-book.

"A. I did. I kept the time-book from the 29th day, I think it was the 29th day of June, until the 29th day of July, when I left there. I kept the time-book most of that time.

"Q. From that data do you know when these different men quit work there?

"A. I do.

"Q. Now, Mr. Dill, will you refer to such data as you have and made yourself, that you can testify from, as to when Mr. Stuart was there, and when he quit work.

"A. Well, I will have to go to the time-book."

Then an objection was sustained by the court to the effect that the testimony was incompetent except during the time that the book was kept by Mr. Dill himself, the rest being hearsay. The question being repeated, the witness said:

"Mr. Stuart left there before I got the time-book to keep time with. * *

"Q. You have knowledge of his working there, have you?

"A. Oh, yes, I know he was there and worked.

"Q. Have you any record in your possession that the company kept, of his time?

"A. I have as far as the time-book is concerned."

Objection was then made to the time-book being admitted for the reason that it is incompetent, irrelevant and immaterial, and it is not shown that he kept it nor that it is correct, but the court admitted it in evidence.

4. Books of account and the like are received in testimony as ancillary to the declarations on oath of a witness who either knows the fact in general and is compelled to refer to the books for detail or where having at one time knowledge of the fact he is compelled to refresh his memory from them, or, failing in that, he is able to state that he knew the fact when he made the entry and that it was entered correctly. Such writings are not evidence *per se*. They do not prove themselves and are not original evidence in the full sense of the word. Books, therefore, must be authenticated by the oath of someone who made or directed the entry with authority, if living and capable as a witness, otherwise by proof of his handwriting posting the entries: 10 R. C. L. 1174; *Harmon* v. *Decker,* 41 Or. 587 (68 Pac. 11, 1111, 93 Am. St. Rep. 748); *Mason* v. *Melhase,* 64 Or. 522 (130 Pac. 1134); *Lintner* v. *Wiles,* 70 Or. 350 (141 Pac. 871).

5. Dill only testifies that he kept the book most of the time from June 29th to the same date in the successive month. He does not even say that he kept it correctly or that he had knowledge of the facts upon which his entries were founded. He does not point out even what entries he made for that part of the time that he kept the book. The greater portion of the claims for which liens are sought to be enforced were founded upon labor alleged to have been performed before he ever had custody of the book. It is true that he says that a few days before he appeared in the Circuit Court as a witness he received the book indirectly from the secretary of the company in Seattle; but there is an utter absence of any sworn testimony authenticating it before he received it into his custody. Under all the authorities it must be laid out of the case as evidence.

The following claims assigned to the plaintiff depend entirely upon the translation which Dill made of the time-book in question to show how long the original claimants worked at the mine, viz.: Axel Wengren, Charles Denny, F. F. Turner (first claim), Cecil Merrill, L. W. Becker, Earl Taylor, Elmer Somerville, J. R. Somerville, and J. A. Shira. The latter was a witness in behalf of the plaintiff but made no statement respecting the length of time he himself labored, if at all, or the character of his services.

6. As to the claim of F. F. Turner, his own testimony shows that he was away from the mine much of the time; that while there he was a mere caretaker, and that his claim consists largely of hotel bills in La Grande and Union while he was thus absent. None of his evidence brings him within the rule laid down in *Durkheimer* v. *Copperopolis Copper Co.*, 55 Or. 37 (104 Pac. 895), holding that the labor mentioned in the statute for miners' liens means actual physical labor unequivocally performed upon the property.

The support of the following claims does not depend upon the time-book for the claimants themselves appeared in person as witnesses and testified respecting their services in kind and quantity as follows: E. J. Stuart, $141.35; O. J. Burnett, $130.50; Christy Nelson, $62.72; R. E. Lindley, $234.21; W. W. Dill, $563.40; La Grande Grocery Co., $172.13; Sawyer-Clark Company, $44.58. No assignment of error is made in regard to the finding of fact that these two latter claims being for groceries and other supplies furnished for use at the mine were true as stated in the complaint.

7. The demand for interest must be denied on the authority of *Sargent* v. *American Bank & Trust Co.*, 80 Or. 16 (154 Pac. 759, 156 Pac. 431). The claims last above mentioned will therefore be allowed and a decree entered foreclosing the same at those amounts, including the sum of $4.20 for each one as a fee for filing and recording the same.

8. The attorney fee will be fixed at $250. This is properly allowed in a lump sum although founded on several claims: *Bishop* v. *Henry,* 84 Or. 389, (165 Pac. 237.) The other claims must be dismissed for failure of proof.

9. We remember, however, that this is a foreclosure proceeding and that failure of the lien does not necessarily involve the actual validity of the indebtedness of the defendant company to the claimants who have fallen short in the testimony. As to them, therefore, the decree will be that this suit is dismissed without prejudice to the right of their assignee to recover from the defendant company by action at law or otherwise as he properly may be advised. MODIFIED. REHEARING DENIED.

MR. JUSTICE BEAN took no part in the consideration of this case.

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1. Inclosing a part of a street for some seventeen years does not establish title by adverse possession, for the reason that in 1895 (Laws 1895, p. 87), an act was passed by the legislative assembly preventing the extinguishment of highways by adverse possession. (See, also, Laws 1903, p. 279; Sections 6871, 6872, L. O. L.) (McCoy v. Thompson, 141.)

AFFIDAVITS.

See Appeal and Error, 15.

AGENCY.

See Carriers, 14.

AGREEMENT.

Effect of Agreement to Make Contract in Future.

See Contracts, 5.

AMENDMENT.

See Appeal and Error, 4, 10.
See Equity, 2, 4.
See Highways, 3.
See Pleading, 9.

Passage of Bill as Amended by Legislature.

See Statutes, 4.

APPEAL AND ERROR.

Appeal and Error—Findings—Remanding Cause for New Trial.

1. Where some of the findings made by the Circuit Court were indefinite and a failure to make any findings on other issues involved will preclude the appellate court from entering a judgment, the cause will be remanded for a new trial. (Clifford v. Smith Meat Co., 1.)

Appeal and Error—Harmless Error—Instructions.

2. An erroneous instruction that defendant carrier by water was not liable for loss occasioned by sudden change in water conditions is harmless, where plaintiff's failure of proof prevented recovery in any event. (Rosenwald v. Oregon City Transp. Co., 15.)

Appeal and Error—Necessity of Decision.

3. It is unnecessary to consider plaintiff's assignment of error concerning a restriction on argument of counsel, where plaintiff's failure of proof prevented recovery in any event. (Rosenwald v. Oregon City Transp. Co., 15.)

Appeal and Error—Determination—Remand for Amendment—Failure of Proof.

4. Sections 97-99, L. O. L., relating to curing variances by amendment, but providing that failure of proof is not a variance, does not authorize remanding a case with permission to amend, where plaintiff entirely failed to prove his allegations. (Rosenwald v. Oregon City Transp. Co., 15.)

Appeal and Error—Modification of Judgment—Failure of Proof.

5. Where plaintiff's failure of proof merited a nonsuit below, a judgment for defendant will be modified to one of nonsuit, although plaintiff resisted a nonsuit motion in the court below. (Rosenwald v. Oregon City Transp. Co., 15.)

Appeal and Error—Review—Findings.

6. The findings of the trial court being equivalent to a verdict, the evidence will not be examined on appeal except to ascertain whether any of it is competent to support the findings. (Meagher v. Eilers Music House, 33.)

Appeal and Error—Review—Findings.

7. A jury finding on conflicting evidence will not be disturbed on appeal, if there is any evidence to sustain it. (Crowder v. Yovovich, 41.)

Appeal and Error—Assignments of Error.

8. Assignments of error, containing a statement of what was done, plus the complaints made by appellants, are sufficiently specific, definite and certain. (Oregon Art Tile Co. v. Hegele, 82.)

Appeal and Error—Review—Findings.

9. On appeal in a proceeding at law, the findings of the trial court as to the facts are conclusive. (Maryland Casualty Co. v. Klaber's Estate, 115.)

Appeal and Error—Assignment of Error—Complaint—Amendment.

10. Where error is not assigned to the order of the lower court in permitting matter to be set up in a supplemental complaint which should have been pleaded by way of amendment to the original complaint, the appellate court will treat such supplemental complaint as an amendment of the original complaint properly allowed. (Hetrick v. Gerlinger Motor Car Co., 133.)

Appeal and Error—Assignment of Error—Sufficiency.

11. Under the rule of the Supreme Court requiring that appellant set out briefly and concisely the errors relied on, where the bill of exceptions shows that plaintiffs-appellants pointed out to the lower court with precision and great detail what their contentions were, and such contentions are presented in the Supreme Court in plaintiff's briefs with the same clearness, the assignment of error that the trial court erred in not rendering judgment for plaintiffs in a larger amount is sufficient, since the rule should be construed reasonably and liberally to promote justice, and not so as to embarrass suitors by unnecessary restrictions. (Hayden v. City of Astoria, 205.)

Appeal and Error—Review—Findings of Court Without Jury.

12. In trying a case without a jury, the Circuit Court exercised the functions of a jury, and its findings, having the force and effect of a special verdict, and entitling plaintiffs, in whose favor they were, to the benefit of any conclusions of law arising from them, are binding on the Supreme Court, unless wholly without support in evidence. (Hayden v. City of Astoria, 205.)

Appeal and Error—Review—Finding on Conflicting Testimony.

13. A finding on conflicting testimony made by the Circuit Court trying a case without a jury is binding on the Supreme Court. (Hayden v. City of Astoria, 205.)

Appeal and Error—Remand for Correction—Necessity.

14. Under Article VII, Section 3, of the Constitution, as amended in 1910, the Supreme Court need not remand the cause for new trial to correct numerical errors in the judgment, one caused by a mistake in addition, the other by mistranscribing an item in a finding of fact, the Supreme Court being entitled to direct the trial court to correct the judgment. (Hayden v. City of Astoria, 205.)

Appeal and Error—Record—Failure to File Transcript—Motion to Dismiss—Affidavits.

15. The recitals of a nunc pro tunc order as to an appeal order previously made extending the time for filing transcript on appeal imports absolute verity, and cannot be contradicted, on motion to dismiss the appeal for failure to file transcript, by affidavits of counsel as to what actually occurred at the time of the previous order. (White v. East Side Mill Co., 224.)

Appeal and Error—Transcript—Time for Filing—Extension.

16. Under Act Feb. 28, 1913 (Laws 1913, p. 619), providing that the trial court or Supreme Court may enlarge the time for filing the transcript, but that such order shall be made within the time allowed to file the transcript, an order extending the time for filing the transcript may be entered before appeal has been perfected. (White v. East Side Mill Co., 224.)

Appeal and Error—Order Extending Time to File Transcript—"From Day to Day."

17. An order extending time for filing transcript "from day to day" is self-executing to extend the time from one day to another until the next term of the appellate court, and gives the court making it jurisdiction to make further order limiting the time for such filing. (White v. East Side Mill Co., 224.)

Appeal and Error—Transcript—Time to File—Extension—Nunc Pro Tunc Order.

18. An order reciting that the court previously orally ordered that time for filing transcript on appeal be extended from day to day and ordering that appellant have an extension of ten days after the date when the court reporter should file a typewritten transcript of his stenographic notes of the testimony, operated not only as a *nunc pro tunc* order, but also as a new order further declaring the limits of time within which the transcript might be filed. (White v. East Side Mill Co., 224.)

Appeal and Error—Record—Time to File Transcript—Extension.

19. Under Laws 1913, page 619, as to extension of time for filing transcript, providing that no such order shall extend it beyond the next term of the appellate court, the expiration of such term automatically ends the right of defendant to file his transcript, whether or not specified by order. (White v. East Side Mill Co., 224.)

Appeal and Error—Rights on Appeal—Liberal Construction.

20. An appeal being a remedy, the laws and actions of courts in respect thereto should be liberally construed with a view to make the remedy effective. (White v. East Side Mill Co., 224.)

Appeal and Error—Right of Appeal—Payment of Costs.

21. The mere fact that costs on former appeal have not been paid does not entitle the defendant to dismissal of the appeal in the absence of showing that the costs cannot be collected. (White v. East Side Mill Co., 224.)

Appeal and Error—Scope of Review—Preservation of Exceptions.

22. A party who fails to move to strike out an answer to a question has no cause for complaint that the testimony was admitted. (White v. East Side Mill Co., 224.)

Appeal and Error—Filing of Transcript—Time to File.

23. Where an appeal was perfected on October 4th, a transcript filed on October 28th following was filed within 30 days after the appeal was perfected, as prescribed by Section 554, L. O. L., as amended by Laws of 1913, page 618. (Cauldwell v. Bingham & Shelley Co., 257.)

Appeal and Error—Filing of Printed Abstract—Time to File.

24. A respondent who formally consented to delay in filing on appeal the printed abstract of record cannot complain of the failure to file the same within the statutory period. (Cauldwell v. Bingham & Shelley Co., 257.)

Appeal and Error—Harmless Error—Instructions.

25. Where the court should have instructed that plaintiff insured was the owner of property burned, defendant insurance company cannot complain because the question was left to the jury. (Waller v. City of New York Ins. Co., 284.)

Appeal and Error—Review—Instructions.

26. Although defendant insurance company's allegations regarding plaintiff's misrepresentations were insufficient, yet instructing that such defense might be waived constitutes reversible error where waiver was not an issue. (Waller v. City of New York Ins. Co., 284.)

Appeal and Error—Decisions Appealable—Stay of Proceedings—Costs.

27. An order providing that plaintiff shall pay the costs of prior suit within 90 days, and in default thereof his suit shall be dismissed, is interlocutory and not appealable pending expiration of the 90 days. (Windsor v. Holloway, 303.)

Appeal and Error — Supreme Court — Jurisdiction—Injunction—Pendente Lite.

28. . The Supreme Court will not continue an injunction restraining a plaintiff in ejectment from proceeding because a chancery suit affecting defendants' right to the property is pending on appeal, where the parties are solvent and defendant's rights can be adequately protected after determination of the chancery appeal. (Noyes-Holland Logging Co. v. Pacific Livestock & Lum. Co., 386.)

Appeal and Error—Review—Harmless Error.

29. In an action against an initial carrier for damages because of the terminal carrier's failure to give notice of nondelivery of the goods shipped, admission of evidence of the custom of railway companies to give notice when the shipment cannot be delivered, if error, was harmless, where such evidence only tended to charge defendant with its legal duty. (Stoddard Lum. Co. v. Oregon-Wash. R. & N. Co., 399.)

Appeal and Error—Review—Harmless Error—Instructions.

30. In an action against a common carrier for failure to notify the consignor of nondelivery, an instruction that the measure of damages was the difference between the market value of the goods when notice should have been given and their value when it was actually given, if erroneous, was harmless, where the verdict gave the proper amount of damages. (Stoddard Lum. Co. v. Oregon-Wash. R. & N. Co., 399.)

Appeal and Error—Presentation of Grounds—Failure to Raise Question.

31. Questions not raised in the lower court will not be reviewed. (Stoddard Lum. Co. v. Oregon-Wash. R. & N. Co., 399.)

Appeal and Error—Supplemental Record—Filing After Decision.

32. Leave to file a supplemental record to correct an error in the transcript on file will not be granted, after the case has been decided and a petition for rehearing has been filed, where it could not lead to any different determination of the appeal. (Noble v. Watrous, 418.)

Appeal and Error—Abstract of Record—Assignments of Error—Necessity for.

33. Where the abstract on appeal contains no assignments of error and the complaint states a cause of action, questions discussed in appellant's brief will not be considered. (King v. Oregon Short Line R. Co., 429.)

Appeal and Error—Presumption of Error—Exclusion of Testimony.

34. In the absence of evidence or tender thereof to show former statements inconsistent with witness' testimony as allowed by Sections 861, 864, L. O. L., it cannot be presumed on appeal that any such testimony was excluded to appellant's prejudice. (Wigan v. La Follett, 488.)

Appeal and Error—Necessity of Bond—Appeal by State Commission—"Interested."

35. The state is "interested" in an appeal by the Industrial Accident Commission from an order reversing its disposition of a claim for

workmen's compensation, so that no appeal bond need be filed, in view of Section 578, L. O. L., providing that the state, when a party or "interested," shall not be required to furnish bond on appeal. (Miller v. State Industrial Acc. Comm., 507.)

Appeal and Error—Motion for Nonsuit—Exceptions.

36. Where, at the close of the evidence for the plaintiff, the defendant moved for a judgment of nonsuit, which was denied, any error of the court in such holding cannot be assigned as a reason for reversal, where the bill of exceptions fails to show an exception was taken to the ruling on the motion; it not being error merely, but error legally excepted to, which is assignable. (Morgan v. Johns, 557.)

Appeal and Error—"Exception"—Matter in Writing and in Record.

37. Under such circumstances, the bill of exceptions containing the official stenographer's report of the case, narrating that the defendant objected or demurred to the sufficiency of plaintiff's testimony, with reasons therefor, is not a matter "in writing and on file in the court," so as to fulfill the requirements of Section 172, L. O. L., providing no exception need be taken or allowed to any decision upon a matter of law, when the same is entered in the journal, or made wholly upon matters in writing and on file in the court; as, when the ruling of the Circuit Court on the motion for nonsuit is made, its determination is not wholly on written data before it, but depends mainly on the oral testimony which the judge has heard, and the bill of exceptions when made, relates to the matters already past and contains the testimony which has been reduced to writing since the trial. (Morgan v. Johns, 557.)

Appeal and Error—Objection to Ruling—"Exception."

38. An exception is an objection taken by the appealing party at the time the adverse ruling was made. (Morgan v. Johns, 557.)

Appeal and Error—Reservation of Grounds for Review.

39. Where plaintiff made no motion for a directed verdict and did not otherwise raise in the lower court the sufficiency of the evidence to support the verdict for defendant, the appellate court will not review the sufficiency thereof. (Marks v. First Nat. Bank, 601.)

Appeal and Error—Questions not Raised Below—Review.

40. In the absence of some action in the lower court raising and reserving other questions, review is limited to jurisdictional questions and the sufficiency of the allegations of the complaint; Const. Amend., Article VII, as amended, Section 3 of the Constitution (see Laws 1911, p. 7), not abrogating this statutory rule of appellate procedure. (Marks v. First Nat. Bank, 601.)

Appeal and Error—Service of Notice of Appeal—Jurisdiction.

41. Presence in the transcript of proof of service of notice of appeal is jurisdictional. (Smith v. Director, 631.)

See Costs, 1.
See Courts, 1–3.
See Master and Servant, 9–11.
See Municipal Corporations, 17.

APPEARANCE.

Appearance—Presumption—General or Special.

1. Where the court has jurisdiction of the subject matter, defendant's appearance will be presumed to have been general, where the record fails to show that it was special. (Roethler v. Cummings, 442.)

Appearance—What Constitutes—Statute.

2. Section 63, L. O. L., providing that defendant's voluntary appearance shall be equivalent to personal service of summons, is not limited to appearance by answer, demurrer, or notice specified in Section 542, as constituting appearance, since the defendant may submit himself to the court's jurisdiction in other ways; the purpose of the latter section being to define what shall be construed such an appearance as will entitle defendant to be heard as a matter of right and to entitle him to service of papers. (Roethler v. Cummings, 442.)

Appearance—By Attorney—Effect of Unauthorized Appearance.

3. Where defendant admits right of an attorney to appear for him, and the attorney has been heard in behalf of his client, the latter is not in a favorable position to claim that appearance was unauthorized. (Roethler v. Cummings, 442.)

Appearance—Service of Process—Waiver of Objection.

4. Where attached property was released on defendant's bond as provided by Section 310, L. O. L., defendant's application therefor was a general appearance, gave the court personal jurisdiction instead of jurisdiction *in rem*, and waived irregularities in service of process. (Roethler v. Cummings, 442.)

Appearance—Nature of.

5. The character of an appearance as general or special does not depend upon the form of the procedure, but upon its substance and the relief sought. (Roethler v. Cummings, 442.)

APPROPRIATION.

See Waters and Watercourses, 5.

ASSESSMENT.

See Municipal Corporations, 17, 18.
See Taxation, 2, 3, 6.

Validity of for Street Improvement.

See Municipal Corporations, 5.

Purchaser at a Void Sale for Street Assessment.

See Municipal Corporations, 16, 18.

ASSIGNMENT.

Assignments—Construction—Intention of Parties.

1. An order drawn on a specific fund may operate as an assignment of such fund. (Wakefield, Fries & Co. v. Parkhurst, 483.)

Assignments—Evidence—Burden of Proof.

2. The burden is upon one alleging that a fund has been assigned to him to prove that fact, and that the alleged assignor parted with control over the fund. (Wakefield, Fries & Co. v. Parkhurst, 483.)

Assignments—Evidence—Sufficiency.

3. A letter written by the lessee of buildings appointing a corporation his agent to collect rents of buildings named, and authorizing such agent, after paying expenses of operation, to turn over the balance to the owner, was not an assignment of the fund to the owner, but was an instruction to the agent as to disposal of the fund, which direction could be modified or revoked, although the lessee later recognized his moral obligation to apply his rentals to the payment of his debts to the owner. (Wakefield, Fries & Co. v. Parkhurst, 483.)

Assignments—Contracts—Personal Relation—Consent of Other Party.

4. A contract by a railroad to construct a spur for the use of a lumber company is one which necessarily must be performed by a large number of men, and in which, therefore, there is no element of personal relationship, so that the contract may be assigned to a purchaser of the railroad either with or without the consent of the lumber company. (Corvallis & Alsea Riv. R. Co. v. Portland E. & E. Ry. Co., 524.)

Assignments—Rights of Parties—Assignment.

5. A contract is generally assignable unless assignment is forbidden by public policy or by the contract itself, or unless its provisions show that one of the parties reposed a personal confidence in the other which he would not have been willing to repose in another person. (Corvallis & Alsea Riv. R. Co. v. Portland E. & E. Ry. Co., 524.)

Assignments—Liability of Assignee.

6. The assignment of a contract operates not merely as an assignment of the moneys thereafter to be earned, but of the whole contract with its obligations and burdens. (Corvallis & Alsea Riv. R. Co. v. Portland E. & E. Ry. Co., 524.)

Assignments—Liability of Assignor.

7. The assignment of a contract does not discharge the assignor from his original undertaking. (Corvallis & Alsea Riv. R. Co. v. Portland E. & E. Ry. Co., 524.)

See Banks and Banking, 1.

Assignment of Contract for Purchase of Land.

See Vendor and Purchaser, 2.

ASSIGNMENT OF ERRORS.

See Appeal and Error, 10, 11, 33.

ASSUMPTION OF MORTGAGE DEBT.

See Mortgages, 1, 2.

ATTORNEY AND CLIENT.

Attorney and Client—Disbarment Proceedings—Complaint.

1. In proceedings under Section 1092, subdivision 1, L. O. L., providing that an attorney may be removed or suspended from practice "upon his being convicted of any felony or of a misdemeanor involving moral turpitude," a complaint charging merely that the defendant was convicted in federal court of using the mails to defraud in violation of Penal Code U. S. (Act Cong. March 4, 1909, c. 321, 35 Stat. 1130 [Comp. Stats. 1916, § 10,385]) Section 215, was demurrable in the absence of specific and substantive charge that he actually committed the offense of which he was convicted. (State ex rel. v. Prendergast, 307.)

See Mines and Minerals, 6.
See Municipal Corporations, 2.

Effect of Unauthorized Appearance by Attorney.

See Appearance, 3.

AUTHENTICATION.

See Evidence, 13, 14.
See Mines and Minerals, 9.

AUTHORITY.

See Schools and School Districts, 2.

AUTOMOBILES.

Liens on Automobiles for Repairs.

See Bailment, 1, 2.

Action for Injury of Guest in Automobile.

See Gas, 2, 3.
See Negligence, 2, 3.

BAGGAGE.

See Carriers, 1–5.

BAILMENT.

Bailment—Repairs on Automobiles—Liens—"Automobile Repairer."

1. Under Section 7497, L. O. L., providing that every automobile repairer who has expended labor, skill and materials at the request of the owner, reputed owner or authorized agent shall have a lien on the automobile for the contract price of the expenditure, although he has surrendered possession of the car, a tire seller who employed men to set tires which he sold and who set new tires sold to the reputed owner of an automobile was an "automobile repairer," and was entitled to a lien; the tire being essential to the complete machine. (Courts v. Clark, 179.)

Bailment—Repairs to Automobile—Liens—Sufficiency of Possession.

2. Where the reputed owner of an automobile left it with a seller of tires to have a new tire attached and went about his business for a short time, the repairer's possession was of sufficient duration to entitle him to a lien under Section 7497, L. O. L. (Courts v. Clark, 179.)

BANKS AND BANKING.

Banks and Banking—Recovery of Deposit—Assignment.

1. In an action by plaintiff in his own behalf and as assignee of three of his relatives to recover from defendant bank an alleged balance of their deposit, exclusion of check drawn by a relative in favor of plaintiff was proper in view of Section 6022, L. O. L., providing that a check is not an assignment of the deposit to the payee. (Marks v. First Nat. Bank, 601.)

Banks and Banking—Deposit—Action—Waiver of Demand.

2. Where defendant bank denied its liability, no demand was necessary in an action to recover an alleged deposit. (Marks v. First Nat. Bank, 601.)

BAY CITY, CHARTER OF.

See State ex Inf. v. Bozorth, 371.

BENEFIT ASSESSMENT.

See Municipal Corporations, 17.

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See Exceptions, Bill of.

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BONDS.

Necessity for Bond on Appeal.

See Appeal and Error, 35.

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See Assignments, 2.
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CANCELLATION OF INSTRUMENTS.

Cancellation of Instruments—Inadequacy of Consideration.

1. Inadequacy of consideration may be so gross as to shock the conscience, and in such case equity will seize on slight circumstances of fraud and oppression as a ground for setting aside the transaction, a principle applicable to a transfer without any consideration, where the relations of the parties preclude the conclusion that a gift was intended. (Toney v. Toney, 310.)

See Mortgages, 7.

CARRIERS.

Carriers—Baggage—Granting Exclusive Right to Transfer Company.

1. A railway company may legally contract with a transfer company giving it exclusive right to solicit from passengers the privilege of transferring baggage, such contracts being for the benefit of both carrier and passengers. (Baggage & Omnibus Transf. Co. v. City of Portland, 343.)

Carriers—Baggage—Granting Exclusive Right to Transfer Company—Constitution.

2. Article I, Section 20, of the Constitution, prohibiting passing of laws granting exclusive privileges, does not prohibit or regulate the carrier's power to grant exclusive rights to a transfer company, since it only applies to the enactment of laws. (Baggage v. Omnibus Transf. Co. v. City of Portland, 343.)

Carriers—Baggage—Granting Exclusive Right to Transfer Company—Statute.

3. Section 6927, L. O. L., prohibiting railroads from giving "undue or unreasonable preference" to any person, does not prohibit railroads from granting exclusive privileges to transfer companies; the legislative intent being merely to prohibit the showing of preference to passengers or shippers. (Baggage & Omnibus Transf. Co. v. City of Portland, 343.)

Carriers—Responsibility for Baggage.

4. Railway companies are responsible, as common carriers, for loss of or damage to baggage during transportation, and for a reasonable time while baggage is in depots for delivery. (Baggage & Omnibus Transf. Co. v. City of Portland, 343.)

Carriers—Baggage—Regulating Use of Station.

5. Since railway companies are responsible for baggage, they may reasonably regulate use of stations, and other matters concerning the dispatch of business for that purpose. (Baggage & Omnibus Transf. Co. v. City of Portland, 343.)

Carriers—Granting Exclusive Right to Transfer Company—Ordinance Prohibiting—Validity—"Public Utility."

6. City of Portland Ordinance No. 29,773, Section 3, prohibiting railway companies from granting exclusive privileges to transfer companies, is invalid, not being warranted or expressly authorized by City of Portland Charter, Article IV, Section 73 (Sp. Laws 1903, p. 26, as amended), empowering council to exercise police powers

"to the same extent as the State of Oregon," and Sections 153 and 154, giving the council "general supervision and power of regulation of all public utilities within the City of Portland and of all persons and corporations engaged in the operation thereof"; the term "public utility" being "deemed to include every plant, property, or system engaged in the public service within the city or operated as a public utility as such terms are commonly understood." (Baggage & Omnibus Transf. Co. v. City of Portland, 343.)

Carriers—Granting Exclusive Rights to Transfer Company—Subject to Exercise of Police Power.

7. The advantage gained by granting exclusive privileges to a transfer company to solicit passenger's baggage is subordinate to a reasonable exercise of police power under which ordinances may be passed in the interest of the traveling public. (Baggage & Omnibus Transf. Co. v. City of Portland, 343.)

Carriers—Carriage of Goods—Delivery—Duty of Carrier.

8. At common law, when it became impossible for a common carrier to deliver shipments in accordance with the contract of carriage, it was its duty to exercise ordinary care and diligence for the protection of the property of the owner. (Stoddard Lum. Co. v. Oregon-Wash. R. &. N. Co., 339.)

Carriers—Carriage of Goods—Failure to Deliver Goods to Consignor.

9. Where a common carrier is unable to deliver the goods shipped to the consignee, it is its duty to exercise due diligence to notify the consignor within a reasonable time. (Stoddard Lum. Co. v. Oregon-Wash. R. & N. Co., 399.)

Carriers—Carriage of Goods—Failure to Deliver—Notice.

10. Where a common carrier is unable to deliver the goods shipped to the consignee, the burden is upon it to show a state of facts relieving it from its duty to notify the consignor within a reasonable time. (Stoddard Lum. Co. v. Oregon-Wash. R. & N. Co., 399.)

Carriers—Carriage of Goods—Notice of Failure to Deliver.

11. Where goods are consigned by a shipper to its own order, with directions to notify a person named, upon failure of the carrier to deliver the goods it is not sufficient that it notify such person, but it must notify the consignor, if the bill of lading shows that he is the owner of the goods. (Stoddard Lum. Co. v. Oregon-Wash. R. & N. Co., 399.)

Carriers—Carriage of Goods—Connecting Carriers—Notice of Nondelivery.

12. Where a carrier is unable to deliver the goods, which have been shipped through connecting carriers, the Carmack Amendment treats such carriers as if they were controlled by a single corporation, and the initial carrier is not relieved of its duty to notify the consignor because the terminal carrier did not know his residence; such carrier being chargeable with the knowledge of the initial carrier thereof. (Stoddard Lum. Co. v. Oregon-Wash. R. & N. Co., 399.)

Carriers—Carriage of Goods—Notice of Nondelivery.

13. Where goods are shipped to the consignor's order, with directions to notify the purchaser of the goods, the carrier cannot extend

credit to such person, but must give notice of nondelivery not later than the day following that on which the goods were offered to the purchaser. (Stoddard Lum. Co. v. Oregon-Wash. R. & N. Co., 399.)

Carriers — Carriage of Goods — Notice of Nondelivery — Carmack Amendment.

14. Under the Carmack Amendment (Act June 29, 1906, c. 3591, § 7, 34 Stat. 595 [U. S. Comp. Stats. 1916, § 8604a]), providing that any common carrier, receiving property for transportation from a point in one state to a point in another state, shall issue a receipt or bill of lading therefor, and shall be liable to the lawful holder thereof for any loss caused by it, or by any common carrier to which such property may be delivered, or over whose lines such property may pass, the initial carrier is liable for the failure of the terminal carrier to properly notify the consignor of failure to deliver goods shipped. (Stoddard Lum. Co. v. Oregon-Wash. R. & N. Co., 399.)

Carriers—Carriage of Goods—Nondelivery of Goods.

15. Where goods are shipped to the consignor's order with directions to notify purchaser thereof, the carrier will not be relieved of its duty to exercise due diligence in caring for goods because of the fact that the consignee is derelict in his duty to receive the goods. (Stoddard Lum. Co. v. Oregon-Wash. R. & N. Co., 399.)

Carriers—Carriage of Goods—Notice of Nondelivery—Agency.

16. Where goods are shipped to the consignor's order, and the bills of lading are sent to a bank at destination, such bank is the consignor's agent for the purpose of presenting the draft only, and not for the purpose of receiving notice that the goods cannot be delivered. (Stoddard Lum. Co. v. Oregon-Wash. R. & N. Co., 399.)

Carriers—Carriage of Goods—Notice of Claim.

17. In an action against a common carrier for damages, due to failure to notify consignor of nondelivery of goods, failure to present a formal bill as a claim for damages within the time limited in the contract was not fatal, where defendant was notified in writing that the consignor had a claim against them and insisted upon its payment; such notification having been given in due time. (Stoddard Lum. Co. v. Oregon-Wash. R. & N. Co., 399.)

Carriers—Carriage of Goods—Notice of Nondelivery.

18. In an action against a common carrier for damages due to failure to give the consignor notice of nondelivery, where the bill of lading provided that the purchaser should have 10 days within which to pay for the goods, the duty did not devolve upon the carrier to give notice of nondelivery until after the expiration of such 10 days. (Stoddard Lum. Co. v. Oregon-Wash. R. & N. Co., 399.)

See Shipping.

Loss of Goods in Transit.

See Pleading, 1.
See Shipping, 1–8.

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Watson v. City of Salem, 666.

CHATTEL MORTGAGES.

Chattel Mortgages—Priorities—Landlord's Lien—Replevin.

1. Where a landlord had a lien on crops under the terms of the lease to secure promissory notes taken for rent, and gave such notes to a bank for collection, and the bank subsequently with notice of landlord's claim took a chattel mortgage upon the crops, the landlord could have recovered the crops in replevin, alleging himself to be the owner and proving the averment by showing that he had a lien upon the property as against the chattel mortgagee who had actual notice of his claim although the lien may not have been recorded. (La Grande Nat. Bank v. Oliver, 582.)

CHILDREN.

When Entitled to Benefits of Mother's Pension Act.

See Infants, 1.

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CONSTITUTIONAL LAW.

Constitutional Law—Privileges and Immunities—Exclusive Right to Catch Salmon—Monopolies.

1. In Oregon, the legislature cannot grant to one person an exclusive right to catch salmon at a place and in waters where all citizens have the right to fish, because, when that which belongs equally to all the citizens of the state is taken from all and vested in only one citizen, it is equivalent to transforming a public right into a monopoly, exercisable by only one citizen, and therefore violative of Article I, Section 20, of the Constitution, providing that no law shall be passed granting to any citizen or class of citizens privileges or immunities, which, on the same terms, shall not equally belong to all citizens. (Monroe v. Withycombe, 328.)

Constitutional Law—Separation of Powers—Delegation of Legislative Power.

2. There is a large class of cases where the legislature may vest in administrative officers power to determine when particular cases do or do not fall within a competent rule established by the legislature. (Monroe v. Withycombe, 328.)

Constitutional Law—Separation of Powers—Delegation of Legislative Power.

3. The legislature may delegate to a board the power to stock a stream with fish and close it against fishing, providing the order is not discriminatory. (Monroe v. Withycombe, 328.)

Constitutional Law—Delegation of Legislative Power to Board—Interference by Court.

4. In cases where the legislature may delegate to and vest in an administrative board a power, the courts will not attempt to control or interfere with the judgment and discretion of the administrative officers. (Monroe v. Withycombe, 328.)

Constitutional Law—Legislative Power—Delegation.

5. The legislature can neither directly nor indirectly empower a mere administrative board to do that which the legislature itself cannot do. (Monroe v. Withycombe, 328.)

Constitutional Law—Adjudication of Rights by Officer or Board—Statute.

6. Laws 1913, page 225, construed as an attempt to vest the master fish warden or board of fish commissioners with judicial power to adjudicate constitutional rights, would be unconstitutional to the extent of such an attempt. (Monroe v. Withycombe, 328.)

Constitutional Law—State Constitution—Limitation of Power.

7. A state Constitution is a limitation and not a grant of power. (Baggage & Omnibus Transf. Co. v. City of Portland, 343.)

Constitutional Law—Obligation of Contracts—State.

8. The state, like a private person, is prohibited from impairing the obligation of a contract entered into by it. (State Land Board v. Lee, 431.)

Constitutional Law — Impairing Obligation of Contracts — Statute of Limitation.

9. A pure statute of limitation affects the remedy, and not the debt, and does not impair any obligation imposed by contract. (State Land Board v. Lee, 431.)

Constitutional Law—Public Policy—Adoption by Voters.

10. Questions of public policy and questions of what it is best to insert in the Constitution must be regarded as having been conclusively settled when the legal voters adopted the amendment. (State ex rel. v. Stannard, 450.)

Constitutional Law—Judicial Functions—Construction.

11. The oath of the judiciary is to construe the Constitution as it is and not as it might have been. (State ex rel. v. Stannard, 450.)

Constitutional Law—Statutes—Presumption.

12. Where the journals of the legislature are silent on the subject, the supreme court will presume that the legislature observed the constitutional requirement that an amendment by one branch of the legislature was concurred in by constitutional majority of the other branch. (State of Oregon v. Boyer, 513.)

See Carriers, 2.
See Counties, 2.
See Statutes, 2–4.

Granting Exclusive Right to Transfer Company.

See Carriers, 1–7.

Capacity of Governor to Sue

See Mandamus, 3.

CONSTITUTION OF OREGON.

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See Mines and Minerals, 8.
See Municipal Corporations, 2.
See Sales, 3, 4.
See Shipping, 2.
See Statutes, 1, 5, 6.
See Trial, 4.

CONTRACTS.

Contracts—Agreement to Contract—Meeting of Minds.

1. There is not the necessary meeting of minds where the terms of the chattel mortgage which parties agree shall be executed and substituted for a lien giving right to possession are not agreed on with certainty. (Gregory v. Oregon Fruit Juice Co., 199.)

Contracts—Construction—Intention of Parties—Entire Instruments.

2. In construing contracts the object is to arrive at the intention of the parties as expressed in the entire instrument. (Corvallis & Alsea Riv. R. Co. v. Portland E. & E. Ry. Co., 524.)

Contracts—Agreement to Purchase Stock—Condition Precedent—Breach.

3. Under a contract to purchase from defendants all corporate stock owned by them, "to be issued as hereinafter set out," agreement by defendants therein to make inventory of goods of corporation according to terms, *held* a covenant and condition precedent to payment, breach of which entitled plaintiffs to recover money deposited with defendants. (Holtz v. Olds, 567.)

Contracts—Agreement to Make Supplemental Agreement—Meeting of Minds.

4. An agreement to purchase stock providing that purchasers will execute a supplemental agreement satisfactory to sellers guaranteeing purchase, and that buyers and said guarantor on said agreement will deposit satisfactory security to be hereafter determined, is void for uncertainty, in that it fails to specify amount of security. (Holtz v. Olds, 567.)

Contracts—Agreement to Make Contract in Future—Effect.

5. An agreement to make a contract in the future is not binding unless all the terms and conditions are agreed upon, and nothing left to future negotiations. (Holtz v. Olds, 567.)

See Account, Action on, 2.
See Account, Stated, 1.
See Assignments, 4–7.
See Constitutional Law, 8, 9.
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CORPORATIONS.

Corporations—Foreign—Doing Business Within State—Process.

1. A foreign corporation doing business within the state is a resident to such an extent that it is amenable to process of state courts. (Hamilton v. North Pac. S. S. Co., 71.)

Corporations—Stockholder's Rights—Showing Fraudulent Judgment Against Corporation.

2. A stockholder, when confronted with a judgment against the corporation may defeat its effect by showing that it was fraudulently and collusively secured, although ordinarily stockholders are bound by a judgment against their corporation. (Robinson v. Phegley, 125.)

COSTS.

Costs—Dilatory Appeal—Damages.

1. Where an appeal was taken in good faith and with probable cause, the respondent is not entitled to 10 per cent of the judgment as damages for delay. (White v. East Side Mill Co., 224.)

Costs—Payment—Stay of Subsequent Suit.

2. It is within the discretionary power of a court to stay proceedings in a suit until the plaintiff therein shall have paid the costs assessed against him in a prior suit between the same parties, involving substantially the same matter and praying for the same relief. (Windsor v. Holloway, 303.)

Costs—Payment—Stay of Proceedings—Discretion.

3. Where a decree was entered enjoining a judgment creditor from setting up, prosecuting or attempting to proceed on the judgments, and such decree was not set aside or any attempt made to set aside same, the entry of an order in a subsequent suit between the same parties, involving the same subject matter and the same relief, requiring that plaintiff pay the costs of the prior suit within 90 days and in default thereof his suit be dismissed, was not an abuse of discretion, where it was not denied that the judgments had been satisfied, though it was alleged that false testimony was introduced in the former case. (Windsor v. Holloway, 303.)

Dismissal of Appeal for Failure to Pay.
See Appeal and Error, 21, 27.

COUNTIES.

Counties—Limitation of Expenditures—Removal of Restrictions—Special Elections.

1. Under Laws of 1917, page 894, directing that a special election be held in June, in all voting precincts of the state, for the purpose of voting on proposed laws and constitutional amendments, authorities of Curry County were not justified in refusing to take steps toward holding the election on the ground the county budget made no provision for the election, for the reason that the next regular election will occur in 1918, although Laws 1913, page 458, provides that no greater expenditure of public moneys shall be made for any specific purpose than the amount estimated in the budget plus 10 per cent, the act of 1917 removing the restrictions by an implied command that the several counties pay the expense of such election. (State ex rel. v. Stannard, 450.)

Counties—Exceeding Debt Limit—"Involuntary Indebtedness"—Elections.

2. Under Article XI, Section 11, of the Constitution, (see Laws 1917, p. 12), providing that the prohibition against the creation of debts by counties prescribed by Section 10 of this Constitution shall apply and extend to debts hereafter created in the performance of any duties or obligations imposed upon counties by the Constitution or laws of the state, etc., any debt contracted by Curry County in holding the special election provided for by Laws 1917, page 894, would be an "involuntary indebtedness," incurred in the performance of a duty and obligation imposed by a law of the state, and therefore prohibited, if exceeding the $5,000 limit fixed by said Section 10. (State ex rel. v. Stannard, 450.)

Counties—Debt Limit—Presumptions.

3. After a levy is made, the payment of taxes is regarded as a certainty, and, for the purpose of determining whether an expenditure will exceed the debt limits of a county, it will be assumed that the tax has been collected. (State ex rel. v. Stannard, 450.)

Counties—Elections—Expenditure of Funds—Preferences.

4. Although, if its plans were carried out, it would be impossible for county to hold the special election provided for by Laws 1917, page 894, without exceeding the constitutional debt limit, it must set aside a sufficient sum to pay for the election, and out of the balance pay for its plans, such obligation having preference. (State ex rel. v. Stannard, 450.)

COUNTY ROADS.

See Highways.

COURTS.

Courts—Appeal from County Court to Circuit Court—Time for Filing Transcript.

1. Section 554, L. O. L., requiring filing of transcript within 30 days after perfecting appeal, is mandatory, and, on appeal from the County to the Circuit Court, all opportunity to confer jurisdiction upon the Circuit Court passes with the lapse of this 30 days without any extension of time granted before its end. (In re Ryan's Estate, 102.)

Courts—Time of Appeal—County Court to Circuit Court—Nunc Pro Tunc Order.

2. Where on appeal from County to Circuit Court transcript is not filed, as required by Section 554, L. O. L., within 30 days from perfecting appeal, the Circuit Court has no power to order that the transcript be filed as of a date within the expired 30 days; the sole purpose of *nunc pro tunc* order being to make the record speak the truth, never to falsify it. (In re Ryan's Estate, 102.)

Courts—Appeal from County Court to Circuit Court—Vacation of Judgment.

3. An appeal from the County to the Circuit Court having been dismissed for failure to file transcript in time, the Circuit Court could not at a subsequent term, without showing of appellant's mistake, inadvertence or excusable neglect, reinstate the cause for trial, for no court has appellate jurisdiction over its own decrees, and after the term at which a decree is entered the court's power over the decree is restricted to making the record conform to the actual truth of what was done at term time. (In re Ryan's Estate, 102.)

Courts—Record—"Journal Entry."

4. A "journal entry" is the prescribed memorial of what the court actually did, and must speak the real truth; so that, if the court did not in fact make an order on a certain date, one cannot be supplied by any subsequent journal entry. (White v. East Side Mill Co., 224.)

Courts—Discretion of Court—Injunction—Dissolution.

5. A temporary restraining order granted without notice to opposing party is subject to dissolution on proper showing, and the question of whether or not the justice who granted the same abused his discretion is not involved. (Noyes-Holland Logging Co. v. Pacific Live Stock & Lum. Co., 386.)

CROSS-EXAMINATION.

See Evidence, 2.
See Witnesses, 1.

CROSSING ACCIDENTS.

See Evidence, 7, 8.
See Municipal Corporations, 14.

DAMAGES.

Damages—Mitigation—Plea of Indebtedness in Conversion—Theory of Pleadings.

1. A defendant, sued for damages for conversion of corporate stock alleged to be pledged to him to secure a debt of plaintiff for advance made by defendant, pleaded general denial and as a separate defense that the transaction was in fact a sale to another with option from the vendee to plaintiff to repurchase on a certain date at a stipulated price, but did not attempt to state any defense for the indebtedness by way of mitigation. *Held*, that defendant is in no position to complain that the court erred in not taking the indebtedness into consideration in the instruction; the theory of the court excluding the subject thereby conforming strictly to the pleadings. (Morgan v. Johns, 557.)

Damages—Mitigation—Necessity for Plea.

2. In a pledgor's action against the pledgee for a conversion of pledged corporate stock, defendant should be required to plead the original indebtedness in mitigation because the jury might actually deduct the amount of the debt and there would be nothing which the pledgor-debtor could plead in bar of a subsequent action to recover it, and because, if litigated in the trover action, the resulting judgment will protect him. (Morgan v. Johns, 557.)

See Costs, 1.
See Equity, 1.
See Estoppel, 1.
See Fraud, 2, 4.
See Trial, 7, 9.

DEATH.

Death—Actions for Death—Right of Administrator to Sue.

1. Employers' Liability Act (Laws 1911, p. 17), Section 4, provides that, on loss of life by negligence, the widow of the person killed, his lineal heirs or adopted children, or the husband, mother or father, as the case may be, shall have a right of action. Section 380, L. O. L., provides that in case of wrongful death the personal representatives of decedent may maintain an action at law therefor. *Held*, that where an employee, having no kin as named in Section 4 of Employers' Liability Act, is killed, though the administrator cannot recover under such section, he can recover under Section 380, L. O. L. (Hawkins v. Anderson & Crowe, Inc., 94.)

DECLARATIONS.

Declaration as Evidence.

See Evidence, 12.

DEDICATION.

Dedication—Plat—Sales With Reference to Recorded Plat—Effect.

1. Dedications are of two general kinds: Common law and statutory. Common-law dedications may be either express or implied, while a statutory dedication operates as a grant. Also, *held*, that an unsuccessful attempt to dedicate land under a statute, if followed by sales with reference to the plat, may result in a completed common-law dedication. (McCoy v. Thompson, 141.)

Dedication—Intent of Dedicator—Construction—Streets.

2. The intent of the dedicator must be clearly manifest, and if the dedication is statutory, the plat and writings furnish the means to ascertain such intent, and must be construed as other writings, while a common-law dedication is determined from the dedicator's acts, conduct and what he said, and construed to give effect to the intent so manifested. Where the plat contains the words "street forty ft. wide" it expresses in plain terms an intent to make a public way, in all that the term implies, and does not mean a private way. (McCoy v. Thompson, 141.)

Dedication—Acceptance by County and Improvement of Street not Essential.

3. Neither a formal acceptance by the county nor the immediate opening and improvement of a street are essential to complete an irrevocable dedication. (McCoy v. Thompson, 141.)

Dedication—Irrevocable Dedication by Referring in Deed to Recorded Plat.

4. Even where express words of dedication are not to be found in the dedication deed, and the street in question is shown by the plat, the sale of lots by the proprietor with reference to such plat is sufficient to constitute a completed and irrevocable dedication, and is, therefore, binding upon the dedicator's successors in interest. (McCoy v. Thompson, 141.)

DEEDS.

Deeds—Recital of Consideration—Contradiction.

1. Where a deed is attacked on the ground of fraud or imposition, the recital of a consideration therein is only *prima facie* evidence that the consideration has in fact been paid; a fraudulent grantee cannot tie the hands of a court of equity by inserting in the deed such a recital contrary to the fact. (Toney v. Toney, 310.)

Deeds—Intoxication—Sufficiency of Evidence.

2. In a suit by a divorced husband to set aside a deed to his wife on the grounds that it was executed without consideration when he was intoxicated, and was a victim of fraud, artifice and imposition, evidence *held* to show that the wife defrauded and imposed on her husband, taking advantage of him when he was intoxicated, pursuant to a design to despoil him of all his property. (Toney v. Toney, 310.)

Construction of Deed.

See Evidence, 11.

DEFICIENCY.

See Mortgages, 5, 6.

DELEGATION OF POWER.

See Constitutional Law, 1–6.

DELIVERY.

See Sales, 6, 7.

DEPARTURE.

See Pleading, 7.

DEPOSIT.

See Banks and Banking, 1, 2.

DISBARMENT.

See Attorney and Client, 1.

DISCOVERY.

Discovery—Failure to Permit Inspection—Presumption—Preliminary Proof.

1. Unsworn statement of plaintiff's counsel of neglect or refusal of defendants to obey an order to give plaintiff an inspection of a writing is not the requisite preliminary proof to make available the presumption, under Section 533, L. O. L., that the terms of the writing are as alleged by plaintiff. (Oregon Art Tile Co. v. Hegele, 82.)

DISCRETION OF COURT.

See Costs, 3.
See Courts, 5.
See Trial, 10.

Scope as to Cross-examination of Witness.
See Witnesses, 1.

DISMISSAL AND NONSUIT.
See Appeal and Error, 36.

DUE CARE.
See Negligence, 2.

ELECTION.

Election Between Defenses.
See Pleading, 1.

Where Buyer Refuses to Accept.
See Sales, 10.

ELECTIONS.
See Counties, 1–4.

EMPLOYERS' LIABILITY ACT.
See Death, 1.
See Master and Servant, 1–8.

EQUITABLE DEFENSE.
See Mortgages, 3, 4.

EQUITY.

Equity—Retaining Jurisdiction—Award of Damages.

1. As a suit to rescind a contract for the purchase of an article and to cancel a note given on account of the purchase price and recover damages is cognizable in equity, when it later appears that the note has been negotiated, as such facts were not known to the plaintiff when he brought the suit, equity will retain the suit for the purpose of awarding plaintiffs the money damages to which they are entitled. (Hetrick v. Gerlinger Motor Car Co., 133.)

Equity—Mortgage Foreclosure—Sufficiency of Averments to Support Decree.

2. In a suit to foreclose a mortgage on land sold by the mortgagor, averments of cross-complaint *held* sufficient to uphold decree that H., the purchaser, assumed and agreed to pay mortgage, and became personally liable therefor, and that, in case of deficiency upon sale, plaintiff be required first to enforce demand against H., and that cross-complainant have judgment against H. for any sum which he may be compelled to pay plaintiff. (Knighton v. Chamberlin, 153.)

Equity—Amendment of Complaint—After Submission of Case.

3. It was proper to allow plaintiff to amend complaint in equity suit to foreclose a mining lien after submission of cause, by attaching copy of notice of lien; the cause being considered upon its merits. (Stuart v. Camp Carson Min. Co., 702.)

Equity—Amendment of Complaint—Liberal Rule.

4. The rule of amendment should be applied more liberally in equity suits than in actions at law. (Stuart v. Camp Carson Min. Co., 702.)

ESTOPPEL.

Estoppel—Undisclosed Principal—Right to Sue for Damages for Deceit.

1. Where the owner of personal property permitted an alleged agent to contract for the exchange of such property for real estate, and represent himself as principal in the contract as owner of the property, and to give his personal obligation as such, such owner was forever barred from contradicting the alleged agent's misrepresentations, and had no cause of action for deceit practiced upon the agent. (Crowder v. Yovovich, 41.)

Estoppel—Municipal Corporations—Location of Street.

2. Where a street was located according to the theory of men who laid out the town, had been maintained for over 40 years, and sidewalks and valuable improvements made, the city is estopped from changing its boundaries merely to attain mathematical exactness. (Hart v. City of Independence, 194.)

See Insurance, 6.
See Vendor and Purchaser, 4, 10.

EVIDENCE.

Evidence—Parol Evidence to Vary Written Agreement.

1. Where the agent of an alleged undisclosed principal annexed to his bill of sale of the personal property exchanged for real estate, an affidavit that he is the owner of such property, parol evidence tending directly to contradict the terms of the bill of sale was not admissible. (Crowder v. Yovovich, 41.)

Evidence—Secondary Evidence—Preliminary Proof.

2. Unsworn declarations of counsel of giving of notice to produce writings for use at the trial will not supply the requisite preliminary proof for introduction under Sections 712, 782, L. O. L., of secondary evidence of their contents. (Oregon Art Tile Co. v. Hegele, 82.)

Evidence—Parol Evidence—Varying Written Contract.

3. In view of Section 713, L. O. L., providing that when the terms of an agreement have been reduced to writing it is considered as containing all those terms except "(2) where the validity of the agreement is the fact in dispute," in a suit to rescind a contract for the purchase of a motor truck, to cancel a promissory note given on account of the purchase price and to recover damages, a provision in the memorandum of sale that "it is understood by the parties hereto that there are no understandings or agreements verbal or otherwise other than those printed or written hereon" did not preclude testimony on the part of the plaintiffs to prove the alleged misrepresentations in reliance on which the truck was purchased, since they are not seeking to modify the written contract in any respect, but are contending that there was no contract because of the fraud perpetrated. (Hetrick v. Gerlinger Motor Car Co., 134.)

Evidence—Expert Evidence—Qualification of Witness.

4. In an action against a city by its contractors to erect a dam to recover on a quantum meruit for extra work, a plaintiff, who had been in the contracting business for 12 years, the excavation of material having been part of the work in which he had been engaged, was qualified to testify as to what is the usual and ordinary way of making an excavation. (Hayden v. City of Astoria, 205.)

Evidence—Expert Evidence—Qualification of Witness.

5. Another witness, who had been in charge of construction work for 10 years or more up to the time of the trial, and who had built 40 miles of railroad, excavation being one of the lines in which he had had large experience, was also qualified. (Hayden v. City of Astoria, 205.)

Evidence—Crossing Accidents—Admissibility.

6. In action for death of traffic officer when struck by auto truck, it was not error to admit statement of witness as to what seemed to him to have been the circumstances where he used the expression as the equivalent of "as I saw it." (White v. East Side Mill Co., 224.)

Evidence—Crossing Accidents—Admissibility.

7. While, as a general rule, a witness must testify to facts and not conclusions or opinions, yet, in action for death of traffic officer when struck by auto truck whose tires were of peculiar make and the tracks of which could not be reproduced, a witness could say that the tracks found fitted the tires of defendant's automobile. (White v. East Side Mill Co., 224.)

Evidence—Province of Jury—Disregarding Testimony.

8. The jury need not accept as conclusive uncontradicted statements of any witness, and it may disregard undisputed testimony if unsatisfactory. (White v. East Side Mill Co., 224.)

Evidence—Independent Contractor—Building Permit.

9. In an action under Employers' Liability Act against defendant to recover damages for fatal injuries to a servant working on a barn, an application for a permit to construct the same in which defendant designated himself as builder is admissible as evidence of his relationship to owner. (Cauldwell v. Bingham & Shelley Co., 257.)

Evidence — Parol Evidence — Construction of Deed — Situation of Parties.

10. To construe a deed, the court should be put in the position of the parties, and if the deed is ambiguous, it may be shown by parol how the parties understood it and dealt with the subject thereof. (Corvallis & Alsea Riv. R. Co. v. Portland E. & E. Ry. Co., 524.)

Evidence—Mental State as Issuable Fact—Declaration as Evidence.

11. In suit to recover the price of a mare which plaintiff claimed he sold and delivered to defendant, where plaintiff took the mare to defendant's farm for trial, and claimed that defendant worked her, said she would answer, and promised to pay for her, but defendant contended that when plaintiff went away, they agreed that he would give the mare a further trial, and return her if she proved unsatisfactory, testimony that after plaintiff went away the witness said to

defendant: "Are you going to take the animal?" and he answered: "I am not perfectly satisfied with her. As soon as I get the kale in I will work her on the hay"—was competent as tending to show defendant's state of mind as to whether the mare suited him, there being nothing to show that defendant's remark was other than a perfectly natural and spontaneous expression indicating the state of his mind. (Roberts v. Bodley, 637.)

Evidence—Cross-examination of Expert—Value.

12. Evidence of particular sale is permitted upon cross-examination in proving value in order to test the qualification of the witness. (Reimers v. Brennan, 53.)

Evidence—Books of Account—Necessity of Authentication.

13. Books of account offered in evidence must be authenticated by the oath of someone who made or directed the entry with authority, or, if this is not possible, by proof of handwriting. (Stuart v. Camp Carson Min. Co., 702.)

Evidence—Books of Account—Authentication.

14. Witness' testimony *held* insufficient to authenticate time-book offered in evidence in mining lien foreclosure. (Stuart v. Camp Carson Min. Co., 702.)

See Adverse Possession, 1.
See Appeal and Error, 4, 5, 13, 34.
See Assignments, 2, 3.
See Deeds, 2.
See Discovery, 1.
See Exchange of Property, 1.
See Fraud, 1.
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EXCEPTIONS.

Preservation of Exceptions.

See Appeal and Error, 22.

Objection to Ruling of Court.

See Appeal and Error, 38.

EXCEPTIONS, BILL OF.

Exceptions, Bill of—Contents.

1. A literal transcript of all the evidence given on trial, interspersed with remarks and objections of counsel and the statements of the court's rulings, having appended what purports to be the entire charge to the jury, is not a bill of exceptions, and the objections made cannot be considered. (Mishler v. Edmunson, 555.)

See Appeal and Error, 36, 37.

EXCHANGE OF PROPERTY.

Exchange of Property—Evidence—Sufficiency.

1. In a suit to rescind an exchange of property, including the assignment by defendants to plaintiffs of the lease of an apartment house, evidence *held* to show that the defendants in operating the apartment house received on an average of $150 a month over all expenses during the time they occupied the premises, so that their representation to that effect was not false. (Blakney v. Rowell, 363.)

Exchange of Property—Warranty.

2. A representation that defendants in operating the apartment house had received on an average of $150 over all expenses during the time they occupied the premises was not a guaranty that the net income which the plaintiffs would receive in operating the apartment house would be $150 a month, or any other sum. (Blakney v. Rowell, 363.)

Exchange of Property—Warranty.

3. If defendants, who, pursuant to an agreement for the exchange of property, assigned their lease of an apartment house to the plaintiffs, warranted that plaintiffs would receive a net gain of $150 a month if they kept the rooms well filled, defendants were not liable for the loss resulting from plaintiffs' inability to keep the rooms well filled. (Blakney v. Rowell, 363.)

EXECUTORS AND ADMINISTRATORS.

Right of Administrator to Sue for Causing Death.

See Death, 1.

EXPERT.

See Evidence, 5.

Cross-examination of Expert Witnesses.

See Evidence, 2.

FINDINGS.

See Appeal and Error, 1, 6, 7, 9, 12.

Finding on Conflicting Testimony.

See Appeal and Error, 13.

Not Sufficiently Definite.

See Master and Servant, 12.

FISH.

Fish—Ownership in State.

1. Fish are *ferae naturae*, and while in a state of freedom their ownership, so far as a right of property can be asserted, is in the state, not as a proprietor, but in its sovereign capacity for the benefit of and in trust for its people in common. (Monroe v. Withycombe, 328.)

Fish—Regulation by State.

2. In the exercise of its police power, and for the welfare of all its citizens, the state can regulate or even prohibit the catching of fish. (Monroe v. Withycombe, 328.)

Fish—Master Fish Warden—Power.

3. The master fish warden of the state, holding a position created and exercising an authority defined by the legislature, cannot do what the legislature cannot empower him to do. (Monroe v. Withycombe, 328.)

Fish—License to Build Fish-traps—Prior Rights—Statute.

4. Under Laws 1913, page 225, providing that it shall be unlawful for the master fish warden or board of fish commissioners to grant a license to any person to build fish-traps in any locality in the Columbia River when in their judgment the same interfere with a prior right of fishing, etc., the mere issuance by the master fish warden to defendant of licenses to build fish-traps in the Columbia River did not foreclose inquiry into the existence of prior fishing rights at the locality involved in suit by aggrieved persons to prevent the construction of the traps, since the statute makes no provision for a notice or hearing, and makes no attempt to vest the warden with judicial authority, so that the doctrine that courts cannot interfere with the judgment and discretion of administrative officers has no application. (Monroe v. Withycombe, 328.)

Fish—Fish-traps—Confiscation of Piling—Statute.

5. Though a person licensed to do so by the master fish warden is not entitled to construct salmon traps in the Columbia River or to maintain the piling driven at each of three places, it would be inequitable to command the warden and board of fish commissioners to remove and confiscate the pilings under the provisions of Laws 1913, page 226, Section 2, when they were driven pursuant to licenses presumably issued in good faith. (Monroe v. Withycombe, 328.)

FISH-TRAPS.

See Fish, 4, 5.

FIXTURES.

Fixtures—Severance of House—Replevin.

1. Negotiations by a homesteader for the sale of his improvements together with a relinquishment of his possessory right to the land as homesteader did not constitute a constructive severance of the house from the realty, which would entitle a creditor to replevin the house as personal property. (Enterprise M. & M. Co. v. Cunningham, 319.)

Fixtures—Conversion or Change of Form—Severance of House.

2. Constructive severance of a fixture must arise from the intention of the owner as evidenced by his acts, and the disclosed purpose of a future severance would not change the character of a building from real estate to personal property. (Enterprise M. & M. Co. v. Cunningham, 319.)

Fixtures—Removal of Fixtures—Recovery by Mortgagee.

3. A mortgagee, whose mortgage is not due, but who is in lawful possession, to recover fixtures from one who has removed them, need not show the security is not ample, or will become so. (Johnson v. Pacific Land Co., 356.)

Fixtures—Subjection to Mortgage.

4. Fixtures attached by the owner of realty, though after the giving of a mortgage, become subject to the mortgage. (Johnson v. Pacific Land Co., 356.)

Fixtures—Water System.

5. Articles which enhance the comfort of a home, such as parts of a water system, are as a rule considered fixtures, when attached in the usual manner. (Johnson v. Pacific Land Co., 356.)

Fixtures—Tests in Determination.

6. In determining whether an article used in connection with realty is a fixture, the general tests are annexation, adaptation to use, where and as annexed, and intention to make the annexation permanent, this intention being inferred from the nature of the article, the relation of the party annexing, the policy of the law in relation thereto, the structure and mode of annexation, and the purpose and use for which it is made; the first two tests, of which the second is entitled to the greater weight, being part of and evidence of the third. (Johnson v. Pacific Land Co., 356.)

See Fraudulent Conveyances, 1.

FLOODING LAND.

See Waters and Watercourses, 4.

FOOD.

Food—Sale of Diseased Food.

1. Section 2227, L. O. L., making the sale of diseased food a criminal offense, is not designed to punish persons innocently selling diseased food products where the defects are latent and not known at the time of the sale. (Swank v. Battaglia, 159.)

See Sales, 2.

FORECLOSURE.

See Equity, 2.
See Mines and Minerals, 10.
See Mortgages, 1–6, 8.

FOREIGN CORPORATION.

See Corporations, 1.
See Limitation of Actions, 1–4.
See Pleading, 2, 3.

FRAUD.

Fraud—Evidence—Question for Jury.

1. In a suit for damages for deceit in the sale of lands, the value of furniture owned by plaintiff and given in exchange as a part of the consideration for the conveyance of defendant's land, *held* for the jury. (Crowder v. Yovovich, 41.)

Fraud—Principal and Agent—Undisclosed Principal—Right to Sue for Damages for Deceit.

2. As the rule that an undisclosed principal may sue upon a contract made by his agent to the same extent as if its relation to the contract was known at the time it was entered into does not apply to the case where an alleged agent made affidavit that he was the owner of personal property exchanged for real estate, and gave a promissory note in his own name, and in every way acted as principal in making the contract, and hence the undisclosed principal cannot sue for deceit practiced upon the agent. (Crowder v. Yovovich, 41.)

Fraud—Reliance on Representations.

3. A purchaser must use reasonable care for his own protection and should not rely blindly upon statements made by a seller; and between parties dealing at arm's-length, where no fiduciary relation exists and no device or artifice is used to prevent an investigation, it is the general rule that a purchaser must make use of his means of knowledge, and, failing to do so, he cannot recover on the ground that he was misled by the seller. (Reimers v. Brennan, 53.)

Fraud—Inspection—Reliance on Representations.

4. Where there has been an inspection by a person making an exchange of property, false representations as to the value cannot, as a rule, be made the basis of an action for damages. (Reimers v. Brennan, 53.)

Fraud—Misrepresentation—Materiality.

5. Where plaintiff, to protect her interest in a corporation, purchased defendant's claims against the company and thereby became owner of its property sold at foreclosure sale, the contract will not be rescinded because of defendant's false representations as to amount of his claims, since plaintiff obtained what she sought; the representations consequently being immaterial. (Robinson v. Phegley, 124.)

Fraud—Misrepresentation—Recovery of Excess Payment—Reformation of Contract.

6. Where plaintiff agrees to purchase defendant's claims against a corporation, paying him therefor the amount of his expenditures for the benefit of the corporation, and defendant misrepresents the amount of such expenditures and plaintiff is thereby induced to pay plaintiff $6,000 in excess of such disbursements, plaintiff on discovery of the fraud is entitled to reform the contract of purchase and recover the $6,000 so paid with interest. Plaintiff's right to recover will not be barred by a judgment recovered by defendant against the corporation corresponding in amount with defendant's representations or by plaintiff's purchase of the corporate property at a sale had under such judgment. (Robinson v. Phegley, 124.)

Fraud—Allegations in General.

7. A pleading alleging fraud must aver falsity of representations, defendant's knowledge thereof, that they were made with intent to

defraud, and that the party seeking relief relied thereon. (Lindstrom v. National Life Ins. Co., 588.)

See Insurance, 4–9.
See Limitation of Actions, 5.
See Sales, 1.
See Trial, 1.

FRAUDS, STATUTE OF.

See Statute of Frauds.

FRAUDULENT CONVEYANCES.

Fraudulent Conveyances—Sales in Bulk—Liability of Buyer—Fixtures—Statute.

1. Tools and machinery in mill purchased by plaintiff in 1911 are not subject to execution to satisfy a subsequent judgment secured by creditor against seller, although no notice was given of the transfer; the bulk sales law (Section 6069, L. O. L., et seq.) before amendment in 1913 (Laws 1913, p. 537) not applying to that class of property. (Golden Rod Milling Co. v. Connell, 551.)

GAS.

Gas Company's Duty to Protect Property Owners.

1. It is the duty of a gas company to protect resident and property owners from damage arising from the escape of gas caused by sewer construction interfering with gas-mains. (Portland Gas & Coke Co. v. Giebisch, 632.)

Gas—Highways—Action for Injuries—Liability of Gas Company.

2. If plaintiff's injury was due solely to the negligence of the automobile driver with whom she was riding as a guest, and not to the manner in which defendant, who laid gas-pipes along the highway, had refilled the trenches, she could not recover. (White v. Portland Gas & Coke Co., 643.)

Gas—Highways—Actions for Injuries—Instructions.

3. In an action by plaintiff for injuries alleged to have been caused by the wheels of the automobile in which she was riding going down into the loose dirt, refilled into trenches dug along the highway by defendant, when turning out to avoid colliding with an approaching car, where there was evidence that the approaching car was being driven rapidly and taking the greater part of the highway, an instruction that, if the accident was due to the negligence of those in control of the other automobile, defendant was not liable was proper. (White v. Portland Gas & Coke Co., 643.)

GIFTS.

Circumstances Rebutting Presumption of Gift.

See Husband and Wife, 1.

HARMLESS ERROR.

See Appeal and Error, 2, 25, 29, 30.

HIGHWAYS.

Highways—Bond Issues—Statutes.

1. Laws 1917, Chapter 423, Section 8, subdivision 5, providing that the funds with which to pay the portion of the expense of construc-

tion of post roads and forest roads payable by the state, under its agreement with the federal government, made by Laws 1917, Chapter 175, Section 1, accepting the provisions of Act of Congress, July 11, 1916, Chapter 241, Section 1 (39 Stat. 355, U. S. Comp. Stats. 1916, § 7477a), shall be secured by the sale of bonds, "as is provided in House Bill No. 21" (Laws 1917, c. 175), applies exclusively to the sale by the State Board of Control, and not by the state highway commission, of such evidences of indebtedness, no part of which can be made up from the $6,000,000 to be raised by issuing bonds for the amount. (Benson v. Withycombe, 652.)

Highways—Statutes—Amendment.

2. Laws 1917, Chapter 423, Sections, 11, 12, providing that the State Highway Commission shall pay the interest on state bonds issued for highway purposes from any funds subject to its control, etc., and that the money received from motor license fees, after the payment of certain expenses, shall be expended under the jurisdiction of the State Highway Commission in payment of the interest and principal of the bonded indebtedness of the state contracted for road purposes under the provisions of Laws 1917, Chapter 175, accepting the offer of the federal government made by act of Congress July 11, 1916, to furnish money for post roads, has impliedly amended all the preceding enactments relating to the construction, operation, and maintenance of state highways and the issuance of funds therefor. (Benson v. Withycombe, 652.)

Highways—Sale of State Bonds—Duty of Board of Control—Statutes.

3. Where, after the State Highway Commission complied with Laws 1917, Chapter 237, Section 13, and set aside sufficient funds to meet payments specified in the order, no money remained in the state highway fund with which to match the federal appropriation for post and forest roads offered by act of Congress of July 11, 1916, and accepted by Laws 1917, Chapter 175, the sale of state bonds in an amount sufficient to raise enough money to meet the appropriation for the year devolved on the State Board of Control. (Benson v. Withycombe, 652.)

See Gas, 2, 3.

HUSBAND AND WIFE.

Husband and Wife—Conveyance—Presumption of Gift—Circumstances Rebutting.

1. Where a wife sued her husband for divorce, their married life having been infelicitous, and he contested the suit, being obliged to provide his wife with suit money, and, after decree of divorce for the wife, she sued out execution, and compelled her husband to pay the money adjudged to be due her with costs, and later the wife attached an interest which the husband had in a millinery store, and seized some of his clothing and personal effects, and carried it away with her, and demanded that he pay her $50 as a consideration for its return, the circumstances were such as to clearly rebut the presumption that the husband intended to make a gift to his wife when he conveyed to her, without consideration, property worth about $6,000. (Toney v. Toney, 310.)

IMMUNITIES.

See Constitutional Law, 1.

IMPEACHMENT.

Impeachment of a Decree.

See Judgment, 2.

Impeaching One's Own Witness.

See Witnesses, 2.

Prior Conviction of Felony or Misdemeanor.

See Witnesses, 3.

IMPROVEMENTS.

See Municipal Corporations, 7–9, 11, 13.

INDEPENDENCE, CHARTER OF.

See Hart v. City of Independence, 194.

INDEPENDENT CONTRACTOR.

See Evidence, 10.
See Master and Servant, 5.

INDICTMENT.

See Intoxicating Liquors, 1, 2.

INFANTS.

Infants—Mother's Pension—Dependency of Children.

1. Under Mothers' Pension Act, Laws 1913, page 75, Section 4, providing that the act shall not apply to a child having property of its own sufficient for its support, and Section 1346, L. O. L., providing for sale of minors' real estate when necessary for their support, where children were left by their father 80 acres of uncultivated land subject to their mother's dower interest, she was not entitled to benefits of the Pension Act until such land had been disposed of according to law and the proceeds exhausted in caring for the children. (Buster v. Marion County, 624.)

INITIATIVE AND REFERENDUM.

Enactment of Charter Amendments.

See Municipal Corporations, 20.

Referendum by Legislature.

See Statutes, 3.

INJUNCTION.

Injunction—Suit to Restrain Trespass—Title or Possession to Support Suit.

1. In a suit to enjoin trespass, prior possession of the premises constitutes *prima facie* evidence and affords sufficient strength of the plaintiff's title to entitle him to relief against a mere trespasser who entered without right. (Camp Carson Mining Co. v. Stephenson, 690.)

See Appeal and Error, 28.
See Courts, 5.
See Waters and Watercourses, 3.

INSPECTION.

See Discovery, 1.
See Fraud, 4.
See Sales, 5–9.

INSTRUCTIONS.

See Appeal and Error, 2, 25, 26, 30.
See Gas, 3.
See Intoxicating Liquors, 3.
See Municipal Corporations, 15.
See Sales, 8.
See Shipping, 6, 7.
See Trial, 1–5, 7–9.
See Trover and Conversion, 3, 4.

INSURANCE.

Insurance—Conditions—Waiver.

1. Under Standard Policy Law (Title XXXIV, Chapter 6, L. O. L.), Sections 4666, 4668, as amended by Laws of 1911, page 279, the statutory conditions as to ownership of insured property cannot be waived except in the manner provided in statute itself, which must be in writing attached to or upon the face of the policy. (Boardman v. Insurance Co. of Pa., 60.)

Insurance—Construction of Fire Policy—Absolute Ownership.

2. A party in possession under a partly performed contract for the purchase of realty is the sole and unconditional owner in fee simple within the Oregon standard fire insurance policy. (Waller v. City of New York Ins. Co., 284.)

Insurance—Pleading—Reply—Waiver.

3. An insured cannot declare upon the policy and, when charged by the insurer's answer with shortcomings, reply that such omissions were waived. (Waller v. City of New York Ins. Co., 284.)

Insurance—Fraudulent Representations—Pleading.

4. A fraudulent misrepresentation avoiding a fire insurance policy must have been knowingly false, have misled the insurer, and increased the risk. (Waller v. City of New York Ins. Co., 284.)

Insurance—Fraudulent Representations—Pleading.

5. Defendant fire insurance company's allegations that plaintiff secured insurance on a house which defendant had previously refused to insure by misstating its name and location, *held* insufficient where facts showing the materiality of such representations or the resulting damage to defendant were not stated. (Waller v. City of New York Ins. Co., 284.)

Insurance—Avoidance—Estoppel—Physician's False Answers in Application.

6. If an applicant for life insurance makes truthful statements to medical examiner, who, without applicant's knowledge, changes answers to questions in application to make it appear that insured is a safe risk, insurer will be liable on the policy issued in consequence of the deceit of its agent. (Lindstrom v. National Life Ins. Co., 588.)

Insurance—Action on Policy—Reply—Knowledge of False Statements in Application—"Collusion."

7. In action on a life policy, reply stating that insured signed application without "collusion" with medical examiner did not allege insured's lack of knowledge of physician's statements therein, the word "collusion" meaning a secret agreement and co-operation for a fraudulent or deceitful purpose; a playing into each other's hands; deceit; fraud. (Lindstrom v. National Life Ins. Co., 588.)

Insurance—Action on Policy—Sufficiency of Evidence—Knowledge of False Statements in Application.

8. In an action on life policy, evidence *held* to justify inference that insured truthfully answered medical examiner's questions, and the latter changed answers in application without insured's knowledge. (Lindstrom v. National Life Ins. Co., 588.)

Insurance—Action on Policy—Sufficiency of Reply—Fraud Inducing Release.

9. In action on life policy the reply was insufficient to show that beneficiary was fraudulently induced to execute alleged release, where it failed to charge that insurer knew falsity of representations, or that they were recklessly made, or that they were made with intent to deceive. (Lindstrom v. National Life Ins. Co., 588.)

See Reformation of Instruments, 4, 5.

INTENT.

See Assignments, 1.
See Contracts, 2.
See Dedication, 2.

INTEREST.

Interest—Allowance to Contractors.

1. In such action, the trial court improperly allowed interest on the contractors' recovery from the date of the completion of the dam, they being entitled to interest only from the date of the judgment on the amounts recovered. (Hayden v. City of Astoria, 205.)

Interest—Absence of Contract—Statute.

2. In the absence of a contract to pay interest, the right to exact it must be found in the statute. (Holtz v. Olds, 567.)

Interest—Accrual of Right—Nature of Liability.

3. Under Section 6028, L. O. L., providing that the rate of interest shall be 6 per cent "on money received to the use of another and retained beyond a reasonable time without the consent of another," etc., plaintiffs were not entitled to interest from date of deposit on money deposited with defendants as security for the purchase of stock under a contract void for uncertainty and recovered by plaintiffs in an action for money had and received, which was honestly litigated by defendants. (Holtz v. Olds, 567.)

Interest—Statutes—Construction.

4. As interest statutes are in derogation of the common law, they must be strictly construed. (Holtz v. Olds, 567.)

Interest—Allowance—Necessity of Statutory Provisions.

5. Interest as such cannot be allowed on foreclosure of lien for work on mines, since the statute does not provide for it. (Stuart v. Camp Carson Min. Co., 702.)

Default in Payment of Interest.
See Vendor and Purchaser, 6.

INTOXICATING LIQUORS.

Intoxicating Liquors—Sufficiency of Indictment—Statute.

1. Under the direct provisions of Laws 1915, page 166, Section 33, it is not necessary that an indictment should disclose that a party charged with the illegal sale of intoxicating liquor did not have legal authority to sell such liquor, or that he was not within any of the exceptions provided for by the act. (State v. Newlin, 323.)

Intoxicating Liquors—Pleading—Proof.

2. In a prosecution for the illegal sale of intoxicating liquors, designated in the indictment as "ethyl alcohol," as "alcohol" and "ethyl alcohol" are practically synonymous, there is no merit in the contention that in disclosing merely a sale of alcohol there was a failure of proof, and that the court erred in instructing the jury that "ethyl alcohol is, as a matter of law, intoxicating liquor." (State v. Newlin, 323.)

Intoxicating Liquors—Instructions.

3. In a prosecution for the illegal sale of intoxicating liquors, where there was evidence that a witness for the state and another went to a point near defendant's place on the day that this sale was alleged to have been made, and that such other went into the defendant's store and came out in a short time with a bottle of alcohol, from which the witness drank, the court properly refused to instruct that there was no evidence that defendant on the day stated made a sale to such person. (State v. Newlin, 323.)

INTOXICATION.

See Deeds, 2.

IRRIGATION.

See Waters and Watercourses, 1, 2.

JUDGMENT.

Judgment—Res Judicata.

1. Until the first decree has been set aside, a suit will not lie to retry a case between the same parties, involving the same subject matter and the same relief. (Windsor v. Holloway, 303.)

Judgment—Impeachment—Perjured Testimony.

2. A decree cannot be impeached in a suit in equity merely on allegations that it was procured by perjured testimony. (Windsor v. Holloway, 303.)

Judgment—Conclusiveness—Persons not Parties.

3. H., the daughter of a person formerly owning an interest in mining claims, obtained letters of administration, and with the consent of defendant, who also owned an interest, entered into possession for the purpose of working the property, and representing the interest of the estate. Defendant then made no claim that the estate had no interest. A controversy having arisen, H. abandoned the administration of the estate, and she and her associates filed relocation notices, and obtained supplies and labor from persons who believed her and her associates to be the owners of the claim. After-

wards defendant brought suit and obtained a decree declaring him the sole owner of all the claims as against H. and her associates. *Held* that, as against the persons furnishing labor and supplies and claiming liens, who were not parties to the suit, the decree took effect as of its date, and did not determine their rights. (Bishop v. Henry, 389.)

Judgment—Conclusiveness—Assignor and Assignee.

4. A judgment for breach of a contract to construct a railroad spur which contract had been assigned to the purchaser of the railroad is conclusive against the purchaser as to the validity of the contract, its breach, and the damages suffered by the other party. (Corvallis & Alsea Riv. R. Co. v. Portland E. & E. Ry. Co., 524.)

Judgment—Pleading Former Adjudication—Sufficiency.

5. In a suit to foreclose a conveyance treated as a mortgage, the judgment was modified on appeal so as to deny attorney's fees. Thereafter the mortgagor's assignee sued to recover rents and profits collected by the mortgagee pending the appeal, and the mortgagee pleaded the decree in the foreclosure suit in bar, setting forth copies of the pleadings, decree, mandate, etc., as exhibits. By way of recoupment and counterclaim the mortgagee sought to recover attorney's fees and certain other expenses. The reply alleged that the question whether defendant was entitled to recover the sum so claimed ought to have been litigated in the former action, and referred to the exhibits attached to the answer, thereby making such exhibits a part thereof and alleged that by reason of such adjudication defendant was estopped from claiming such sums. *Held*, that the reply was sufficient in details to present the question of former adjudication. (Seaweard v. First Nat. Bank, 678.)

Judgment—Conclusiveness—Persons Concluded.

6. A judgment or decree is conclusive, not only on those who are parties to the action or suit, but also on all persons in privity with them. (Seaweard v. First Nat. Bank, 678.)

Judgment—Conclusiveness—Identity of Causes.

7. The test of identity of causes as bearing upon the question of *res judicata* is the identity of the facts essential to their maintenance. (Seaweard v. First Nat. Bank, 678.)

Judgment—Conclusiveness—Parties Concluded.

8. Where, in a mortgage foreclosure suit, attorney's fees were denied on appeal, the judgment was conclusive in a subsequent action by the mortgagor's assignee against the mortgagee in which the mortgagee counterclaimed for and sought to offset such attorney's fees, and no sum could be allowed or offset for such fees. (Seaweard v. First Nat. Bank, 678.)

See Mortgages, 8.

Modification of.

See Appeal and Error, 5.

Fraudulently and Collusively Secured.

See Corporations, 2.

Vacation of.
See Courts, 3.

Judgment on Appeal from Industrial Commission.
See Master and Servant, 11.

Deficiency Judgment.
See Mortgages, 5, 6.

JURISDICTION.

See Appeal and Error, 28, 41.
See Equity, 1.

JURY.

May Disregard Undisputed Testimony.
See Evidence, 9.

Taking Case from the Jury.
See Trial, 6.

JUSTICES OF THE PEACE.

Justices of the Peace—Writ of Review—Waiver of Service of Writ.

1. Where defendant's counsel appeared at hearing in Circuit Court of writ of review proceedings to set aside justice's judgment, the justice having voluntarily made a full return of the writ by prearrangement between counsel, and filed brief and made argument, defendant's appearance was a general one, and service of the writ was waived in view of Section 63, L. O. L., providing that a voluntary appearance shall be equivalent to personal service. (Roethler v. Cummings, 442.)

Justices of the Peace—Writ of Review—Sufficiency of Petition.

2. Petition for writ of review alleging want of service of justice's summons, and no appearance by defendants, *held* sufficient to challenge the jurisdiction of the Circuit Court to render judgment thereon. (Roethler v. Cummings, 442.)

LANDLORD AND TENANT.

Landlord and Tenant—Rent—Holding Over.

1. Where a lessee held over after expiration of a five-year lease, he was liable for rent as a tenant from year to year, in absence of proof that such holding over was merely pending negotiations for readjustment of the rent. (Clifford v. Smith Meat Co., 1.)

Landlord and Tenant—Landlord's Acceptance of Premises.

2. Where the tenant abandoned the premises and attempted to surrender them to the landlord, and the latter refused to accept them, the landlord's reletting the premises to another for the benefit of the original lessee and "subject to the order and ready for the occupation" of the tenant at any time he should return did not operate as an acceptance of the premises by the landlord. (Meagher v. Eilers Music House, 33.)

Landlord and Tenant—Reletting Abandoned Premises.

3. Where a landlord relet abandoned premises for the benefit of the abandoning tenant, but was unable to collect any rent from the new tenant, the abandoning tenant was liable for the rent, as if the premises had not been relet. (Meagher v. Eilers Music House, 33.)

Landlord and Tenant—Lien for Rent—Proceeds of Property.

4. By virtue of his qualified property in the crop, the landlord was authorized to follow it as far as he could trace it, and to sue at law for substituted property, and it having been converted into money, his right of property attached to the money at his option to the extent of his lien on the crop from which the cash was derived. (La Grande Nat. Bank v. Oliver, 582.)

See Chattel Mortgages, 1.

LEGISLATURE.

Laws 1917, c. 238, p. 457, not Passed by Majority Vote of House.

See Statutes, 2–4.

LICENSES.

License to Build Fish-traps.

See Fish, 4.

LIENS.

See Landlord and Tenant, 4.
See Interest, 5.
See Mines and Minerals, 2–10.
See Trover and Conversion, 4.

For Repairs on Automobiles.

See Bailment, 1, 2.

Landlord's Lien.

See Chattel Mortgages, 1.

Nature of Lien on Mine.

See Mechanics' Liens, 1.

LIMITATION OF ACTIONS.

Limitation of Actions—Cause Arising in Other State—Ship on High Seas.

1. Under the rule that a state's territorial sovereignty extends to a vessel of the state when it is upon high seas, the vessel being deemed a part of the territory of the state to which it belongs, an action by a resident of the State of Washington for injury on the high seas on a vessel owned by a California corporation, nonresident of Oregon, is governed by Section 26, L. O. L., as to time to sue on actions arising in another state. (Hamilton v. North Pac. S. S. Co., 71.)

Limitation of Actions—Absence from State—Foreign Corporation—"Out of the State."

2. A foreign corporation maintaining an agent within the state is not "out of the state," within meaning of Section 16, L. O. L., pro-

viding that, when a cause of action has accrued against any person who shall be "out of the state," such action may be commenced within terms specified after return of such person. (Hamilton v. North Pac. S. S. Co., 71.)

Limitation of Actions—Foreign Corporation—Doing Business Within State—"Resident"—"Nonresident."

3. A foreign corporation is a "nonresident," although doing business within this state within meaning of Section 26, L. O. L., providing that, when actions between nonresidents arising in another state are barred by statute of limitation of such state, no action thereon can be here maintained, such corporation being only a resident of the state incorporating it, the word "resident" not meaning "one found within the jurisdiction." (Hamilton v. North Pac. S. S. Co., 71.)

Limitation of Actions—Action for Servant's Injury—Pleading California Statute of Limitations.

4. Where employee, resident of Oregon, sued his employer, a California corporation, for injuries sustained while on the high seas on a steamship owned by employer in California, the employer could plead the one-year California statute of limitations in view of Section 26, L. O. L., providing that, when actions between nonresidents arising in another state are barred by the statute of limitations of such state, no action thereon can be here maintained, and the Oregon two-year statute (Section 8, L. O. L.) did not apply. (Hamilton v. North Pac. S. S. Co., 71.)

Limitation of Actions—Computation of Period—Discovery of Fraud.

5. Where plaintiff, within a reasonable time after learning of defendant's misrepresentations inducing purchase of claims against corporation, brought suit against him, it was immaterial that suit was not commenced within the six-year statute of limitations, since it is the general rule that statute of limitations will not run during the interval when the party was ignorant of the fraud. (Robinson v. Phegley, 124.)

Limitation of Actions—Statutes—Applicability to State.

6. It is a rule that the government is not included in a general statute of limitations unless expressly or by necessary implication included. (State Land Board v. Lee, 431.)

Limitation of Actions—Statutes—Applicability to State.

7. Although the state is not named, if it appears that it is the real party in interest, a limitation statute which does not expressly or by necessary implication include the state will not be permitted to operate. (State Land Board v. Lee, 431.)

Limitation of Actions—Statutes—Applicability to State—"Real Party in Interest."

8. Under Laws 1913, pages 580, 581, Sections 1, 2, 3, providing that no mortgage upon real estate heretofore or hereafter given shall be a lien or encumbrance after the expiration of ten years, etc., does not apply to the foreclosure by state land board of a mortgage given to secure moneys borrowed from the irreducible school fund; the state being the real party in interest, although proceedings are in the name of the state land board. (State Land Board v. Lee, 431.)

See Constitutional Law, 9.

LIMITATION OF INDEBTEDNESS.

See Counties, 1-4.

MANDAMUS.

Mandamus—Subjects of Relief—Restoration to Office.

1. Where an officer has been removed and another appointed to perform the work, *mandamus* is not the proper remedy of the discharged officer, since *quo warranto* is the proper method for trying title to an office. (Alexander v. School Dist. No. 1, 172.)

Mandamus—Issues—Competency of Teacher—Transfer.

2. In *mandamus* proceedings to compel a school board to restore a teacher to her former position as principal, where the transfer of the teacher was within the board's discretion, the court cannot consider whether her services as principal were satisfactory. (Alexander v. School Dist. No. 1, 172.)

Mandamus—Capacity of Governor to Sue—Constitution.

3. Under Article V, Section 10 of the Constitution, declaring that the Governor shall take care that the laws shall be faithfully executed, the Governor of the State has the right to bring *mandamus* to compel the county clerk of a county, the sheriff, the county judge, and others to perform the duties imposed upon them by law in regard to the calling and holding of elections, and, in particular, in respect to a special election. (State ex rel. v. Stannard, 450.)

Mandamus—Prematurity of Proceeding—Compelling Action by Election Officials.

4. The Governor could bring *mandamus* to compel the county clerk of a county, the sheriff, and other officers to perform the duties imposed upon them by law in regard to the calling and holding of election before the time had arrived on which the posting of notices and other prerequisites to the election are required to be done, the officials having absolutely refused to take steps toward holding the election, and declared their intention not to do so, since, though ordinarily *mandamus* will not lie to compel the performance of an act until the time for doing the act has arrived, where a refusal to perform has occurred, and where it seems probable that the act will not be performed within the time required, *mandamus* will lie, and a proceeding brought upon the strength of the refusal is not premature. (State ex rel. v. Stannard, 450.)

MASTER AND SERVANT.

Master and Servant—Employers' Liability Act—When Operative.

1. The Employers' Liability Act is not applicable to cases wherein the rights of the parties are determined by maritime law. (Hawkins v. Anderson & Crowe, Inc., 95.)

Master and Servant—Negligence—Injuries to Servant—Employers' Liability Act—Contributory Negligence.

2. In a servant's action for injuries, a complaint alleging that defendant employed plaintiff as a farm laborer and directed him to go to the second story of a barn for the purpose of assisting in throwing down hay, negligently failing to warn him that there was a hole in the floor of the second story or to guard such hole, and that owing

to darkness and insufficiency of lantern light the plaintiff fell through such hole and was injured, stated a cause of action within the purview of the Employers' Liability Act (Laws 1911, p. 16); and hence, under the direct provisions of Section 6 of the act, contributory negligence of plaintiff was not a defense, but could only be taken into account by the jury in fixing the amount of damages. (Poullos v. Grove, 106.)

Master and Servant—Injuries to Servant—Employers' Liability Act—Question for Jury.

3. The question whether plaintiff's employment was one of risk or danger, and hence under the Employers' Liability Act, which involves the consideration of the conditions under which the work was to be performed as well as the class of employment, *held* for the jury under proper instructions. (Poullos v. Grove, 106.)

Master and Servant—Injury to Servant—Employers' Liability Act—Sufficiency of Evidence.

4. Evidence held sufficient to go to the jury on the hypothesis that plaintiff was in the loft pursuant to the direction of the defendant, that he was ignorant of the hole, and that he could not see it owing to the darkness and insufficiency of the lantern light. (Poullos v. Grove, 106.)

Master and Servant—Personal Injuries—Independent Contractor—Employers' Liability Act.

5. Under Employers' Liability Act (Laws 1911, pp. 16, 17), providing that all owners, contractors, subcontractors, or other persons whatsoever engaged in the construction of any building shall see that all shafts, wells, and floor openings are inclosed, and shall be liable for failure to comply with this act, etc., one having a contract to do mason work of a barn for total cost, with 10 per cent additional for superintending, and another having a contract to take immediate charge of carpenter work at a flat rate over cost of labor and materials, who are both actually engaged in construction of a barn and responsible for laying of a temporary floor over basement, are liable for fatal injuries to a servant of the latter who falls through an unguarded opening in the floor; the test of whether they are servants or contractors not being in the manner of their receiving compensation. (Cauldwell v. Bingham & Shelley Co., 257.)

Master and Servant—Injuries to Servant—Guarding Openings in Floor—Employers' Liability Act.

6. Under Employers' Liability Act, providing that all owners, contractors, subcontractors, or other persons whatsoever engaged in the construction of any building shall see that all shafts, wells and floor openings are inclosed, and shall be liable for failure to comply with this act, etc., it cannot be held as a matter of law that a staging on top of a trestle about five feet above an opening in a temporary floor laid over basement of a barn under construction is an inclosure within the meaning of the statute. (Cauldwell v. Bingham & Shelley Co., 257.)

Master and Servant—Superintendent—Employers' Liability Act.

7. Although Employers' Liability Act, Section 2, declares that a superintendent or person in charge of particular work shall be held to be the agent of the employer in cases for damages, it does not relieve a superintendent from personal liability for duties enjoined by Section 3. (Cauldwell v. Bingham & Shelley Co., 257.)

Master and Servant—Employers' Liability Act—"Opening."

8. Employers' Liability Act, providing that all shafts, floor openings, etc., shall be inclosed includes an "opening" in a temporary floor laid over basement of a barn, and that one party engaged in the construction does not desire to have a permanent floor constructed till the roof is put on, does not give the other a license to neglect to fulfill the requirements of the statute. (Cauldwell v. Bingham & Shelley Co., 257.)

Master and Servant—Workmen's Compensation Act—Expediting Appeals.

9. By Workmen's Compensation Act (Laws 1913, c. 112), Section 32, providing that an appeal from a decision of the Industrial Accident Commission shall have precedence over all other cases, except criminal cases, the legislature did not intend that such appeal should be expedited to the extent of disarranging the orderly transaction of business in the Circuit Court, or that cases already set for trial with witnesses under subpoena should be displaced for such purpose. (Miller v. State Industrial Acc. Comm., 507.)

Master and Servant—Workmen's Compensation Act—Appeal to Circuit Court—Hearing De Novo.

10. Under the Workmen's Compensation Act, providing that on hearing of an appeal to the Circuit Court, the court, in its discretion, may submit to a jury any question of fact involved, and that the proceedings shall be informal and summary, but full opportunity to be heard shall be had before judgment is pronounced, on appeal to the Circuit Court from an order of the Industrial Accident Commission, the court properly considered other evidence than that submitted to the commission on the original hearing, thus making the hearing practically a *de novo* trial. (Miller v. State Industrial Acc. Comm., 507.)

Master and Servant—Workmen's Compensation Act—Judgment on Appeal from Industrial Commission.

11. On appeal to the Circuit Court from an order of the Industrial Accident Commission in proceedings by an injured servant for compensation under the Workmen's Compensation Act, the court improperly entered judgment for the servant based on conclusions of law that in deciding what amount should be awarded the court was not limited to compensation as provided by the Workmen's Compensation Act; that the court was entitled to hear and consider only such testimony as would have been competent, relevant, and material had the case been an action at law to recover damages for a personal injury; that in fixing the amount to be allowed the servant, the court was not limited by any schedules of the act, nor by any provision for monthly payments, etc.; and that in making an allowance for surgical and medical services, the court was not limited to the surgical scale established by the commission under the act. (Miller v. State Industrial Acc. Comm., 507.)

Master and Servant—Workmen's Compensation Act—Findings of Circuit Court—Definiteness.

12. On appeal from judgment of the Circuit Court on appeal to it from an order of the Industrial Accident Commission in an injured servant's proceeding for compensation under the Workmen's Compensation Act, court's findings for the servant *held* not sufficiently definite to enable the Supreme Court to enter final judgment; the con-

clusions of law and judgment below being erroneous. (Miller v. State Industrial Acc. Comm., 507.)

MASTER FISH WARDEN.

See Fish, 3.

MECHANICS' LIENS.

Mechanics' Liens—Mines and Minerals—Nature of Lien.

1. A mechanic's or miner's lien is a creation of the statute, which must be looked to for the right to file any such lien. (Bishop v. Henry, 389.)

MEETING OF MINDS.

See Contracts, 4.

MINES AND MINERALS.

Mines and Minerals—Money Lent—Evidence.

1. Plaintiff cannot recover for money advanced for defendant to pay his share of a mining claim interest they had agreed to purchase and own together, where plaintiff took the title to the entire interest in his own name. (Hinderliter v. McDonald, 251.)

Mines and Minerals—Claim of Lien—Ownership of Property.

2. Section 7445, L. O. L., requiring every laborer or materialman claiming a lien on a mine, etc., to file a claim, containing a statement of his demand, with the name of the owner or reputed owner, if known, and the name of the person by whom he was employed, or to whom he furnished the materials, is complied with by a statement, that the person against whom the lien is claimed is the owner and reputed owner, or by a statement in the alternative that a designated person is the owner or reputed owner. (Bishop v. Henry, 389.)

Mines and Minerals—Claim of Lien—Ownership of Property.

3. Under Section 7445, L. O. L., the claim of lien need not state the name of the owner when such owner is not known. (Bishop v. Henry, 389.)

Mines and Minerals—Liens—Consent of Owner.

4. As H. and her associates went into possession with defendant's permission, he should have posted notices as provided by Section 7444, L. O. L., in the case of owners of a mine worked by lessees or by persons other than the owner, if he desired to prevent liens attaching to the claims. (Bishop v. Henry, 389.)

Mines and Minerals—Liens—Claim of Lien.

5. Lien notices stating that H. and her associates were the agents of the owner of the claim and were the owners and reputed owners thereof were sufficient without naming defendant; as Section 7445, L. O. L., requiring the name of the owner or reputed owner, "if known," was apparently intended to apply to such a case where title in fee was in the government, and neither party had much more than a possessory right. (Bishop v. Henry, 389.)

Mines and Minerals—Liens—Enforcement—Attorney's Fees.

6. In a suit to foreclose mining liens for labor performed and materials and supplies furnished by plaintiff and by other persons who had assigned their claims to plaintiff, it was immaterial whether

reasonable attorney's fees should be allowed for all the claims in the aggregate or singly. (Bishop v. Henry, 389.)

Mines and Minerals—Liens—Recording of Claim—Compliance with Statute.

7. Where a claim of lien for work on mines was recorded in same book as mechanics' liens, and directly and indirectly indexed, this was sufficient compliance with Section 7446, L. O. L., providing that the county clerk shall record claims in a book kept for that purpose and indexed as deeds and other conveyances are required to be indexed, and Section 7421, providing substantially the same requirements for mechanics' liens. (Stuart v. Camp Carson Min. Co., 702.)

Mines and Minerals—Liens—Construction of Statute—"Labor."

8. "Labor" mentioned in miners' lien statute means actual physical labor unequivocally performed on the property. (Stuart v. Camp Carson Min. Co., 702.)

Mines and Minerals—Liens—Allowance of Attorney Fees—Combined Claims.

9. An attorney fee was properly allowed in a lump sum, although founded on several claims for mining liens assigned to plaintiff. (Stuart v. Camp Carson Min. Co., 702.)

Mines and Minerals—Liens—Effect of Failure of Lien.

10. Failure of a mining lien in foreclosure proceedings does not necessarily involve validity of defendant's indebtedness to claimants. (Stuart v. Camp Carson Min. Co., 702.)

See Mechanics' Liens, 1.
See Statute of Frauds.

MISTAKE.

See Reformation of Instruments, 2, 3.

MITIGATION.

Necessity for Plea.

See Damages, 1, 2.

MONEY LENT.

Money Lent—Admissibility of Evidence.

1. It is competent to establish by parol testimony that money was borrowed, irrespective of the purpose to which it was to be applied. (Hinderliter v. McDonald, 251.)

Money Lent—Pleading—Construction.

2. Under a complaint that plaintiff advanced money for defendant to pay his share of a mining claim they had agreed to purchase, the allegation regarding the agreement to purchase the mining claim is material and must be proved by competent evidence, since the advance of money was merely incidental for that purpose. (Hinderliter v. McDonald, 251.

See Mines and Minerals, 1.

MONOPOLIES.

Exclusive Right to Catch Salmon.

See Constitutional Law, 1.

MORTGAGES.

Mortgages—Assumption of Mortgage Debt—Evidence.

1. In a suit against C. and H. to foreclose a mortgage on land, conflicting evidence *held* to support a court finding that H. by oral agreement assumed the mortgage. (Knighton v. Chamberlin, 153.)

Mortgages—Oral Promise to Assume Mortgage—Enforceability.

2. A verbal promise by grantee to assume and pay a mortgage on land, if clearly established, is valid and enforceable in equity. (Knighton v. Chamberlin, 153.)

Mortgages—Foreclosure—Equitable Defense.

3. In a mortgage foreclosure action, defendant's claim that plaintiff's failure to furnish water for irrigating the land pursuant to a contract made as part of the mortgage transaction is available as an equitable defense, although not strictly a counterclaim. (Smith v. Willis, 270.)

Mortgages—Foreclosure—Defense—Sufficiency of Pleading.

4. In a mortgage foreclosure action, defendant's allegations that its agricultural crops were injured by plaintiff's failure to furnish water for irrigation pursuant to contract *held* sufficient, in absence of motion to make more definite. (Smith v. Willis, 270.)

Mortgages—Foreclosure—Deficiency—Judgment.

5. Where the demurrer to an answer in a mortgage foreclosure action was sustained, the court could not decree there should be no deficiency judgment, since there was no pleading upon which it could find the mortgage was given for the purchase price. (Smith v. Willis, 270.)

Mortgages—Foreclosure—Deficiency—Judgment.

6. Where a deed, the vendor's agreement to furnish water for irrigation, and a mortgage securing payment for the land and water rights constituted one transaction, no deficiency judgment can be rendered upon foreclosing the mortgage, since it was a purchase-money mortgage. (Smith v. Willis, 270.)

Mortgages—Agreement to Surrender Mortgage and Note—Sufficiency of Evidence.

7. In suit to cancel a note and mortgage, evidence held sufficient to sustain finding that defendant agreed to surrender the note and mortgage. (Shane v. Gordon, 627.)

Mortgages—Foreclosure—Judgment—Conclusiveness.

8. Where, in a suit to foreclose a conveyance treated as a mortgage, the Supreme Court decreed strict foreclosure, to be avoided upon payment of the amount due within 90 days, defendants did not lose their right to recover rents and profits collected by the mortgagee pending the appeal by failing to apply to the trial court when the mandate was sent down to have the amount of such rents and profits credited on the sum to be paid for redemption, as the determination of that issue would have been equivalent to the institution of an action at law, and the defendants, having only 90 days within which to redeem, were not required to speculate upon the trial of such issue. (Seaweard v. First Nat. Bank, 678.)

See Fixtures, 3, 4.

Foreclosure of.
See Equity, 2.

Reimbursement for Care of Property.
See Pledges, 3.

MOTHER'S PENSION.

Set Infants, 1.

MOTIONS.

Motions—Nunc Pro Tunc Order.

1. The authority to make an order *nunc pro tunc* cannot be used to amend or change an order actually made. (White v. East Side Mill Co., 224.)

See Appeal and Error, 15.

MUNICIPAL CORPORATIONS.

Municipal Corporations — Disbursement of Funds — Warrants — Necessity of Mayor's Signature.

1. Where a city charter authorized the recorder to draw a warrant on the treasurer for the amount ordered paid, and directed the treasurer to pay out moneys on warrants signed by the recorder, the mayor's signature was not necessary to the validity of such a warrant although a prior ordinance had required his signature and the charter provided that ordinances then existing and not inconsistent with it should be continued. (Todd v. Cormier, 11.)

Municipal Corporations—Employment of Attorneys—Compensation—Ordinances—Construction—"Extraordinary Services."

2. Where an ordinance authorized employment of an attorney at an annual salary of three hundred dollars, "in full for all general services rendered by him as counsel for city officers, and prosecuting all cases in city courts," but provided that the council may allow him such other sums as reasonable for extraordinary services, litigation in state or other outside courts, and necessary business trips outside the city, the words "extraordinary services" include extra services in preparing bonds for the city. (Todd v. Cormier, 11.)

Municipal Corporations—Street Improvement—Notice by Recorder—City Charter.

3. Under Salem City Charter, Section 26, providing that the city council shall, by resolution, determine the portion of a street to be improved, and that notice to property owners must be given by the recorder by order of the council, and must specify with convenient certainty the street or part thereof proposed to be improved, the recorder is not empowered to determine what part of a street shall be improved, and any notice of street improvement given by the recorder, without the sanction of the city council, is not effective, so that a notice given by the recorder, leaving out part of the street determined to be improved by the council, was not good as to the owners adjacent to the portion of the street included in the recorder's notice. (Fry v. City of Salem, 184.)

Municipal Corporations—Street Improvement—Error in Recorder's Notice—Cure.

4. Where a reference in the recorder's notice to the plans and specifications for the improvement of the street, correctly describing

the extent to be improved, was made as a means to ascertain the details and kind of improvement, not to contradict or delineate the description of the portion of the street determined to be improved, the erroneous description of the extent of the street to be improved in the recorder's notice was not cured. (Fry v. City of Salem, 184.)

Municipal Corporations — Street Improvement — Validity of Assessment—Notice—City Charter.

5. Under Salem City Charter, Section 26, requiring ten days' notice of intention to improve a street be given to property owners, where the notice of a street improvement published by the recorder, under direction of the city council, failed to describe correctly the portion of the street affected, omitting a certain extent thereof, the notice did not confer power or jurisdiction upon the common council to take subsequent proceedings for the improvement of the street as originally determined by it, nor to assess the costs against any of the abutting property, and its assessment was invalid. (Fry v. City of Salem, 184.)

Municipal Corporations—Location of Streets—Sufficiency of Evidence.

6. Where a street location had been recognized for 40 years, a survey measured from a corner located by discovering a bottle buried in the ground as described in a deed *held* insufficient to change the boundaries of the street. (Hart v. City of Independence, 194.)

Municipal Corporations — Improvement Contracts — Delaying Contractors—Recovery on Quantum Meruit.

7. Where a city, by enlarging the excavation and by imposing burdensome methods of doing the work, delayed its contractors for a dam so that they could not begin the laying of concrete until the fall, and the most burdensome portion of the work had to be done in the winter season under most disadvantageous conditions, the contractors were entitled to recover on a *quantum meruit* for the excess cost incurred by them. (Hayden v. City of Astoria, 205.)

Municipal Corporations — Improvements — Rights of Contractors — Quantum Meruit—Evidence.

8. In an action against a city by its contractors to erect a dam to recover on a *quantum meruit* for work without the contract, the contract was admissible as establishing the standard of value. (Hayden v. City of Astoria, 205.)

Municipal Corporations—Improvements—Extra Work—Recovery.

9. So far as work done without their contract by contractors with a city to erect a dam conforms to the contract in character and in the conditions under which it is done, the contract price will govern the contractors' extra recovery on a *quantum meruit* against the city. (Hayden v. City of Astoria, 205.)

Municipal Corporations—Extra Work—Recovery on Quantum Meruit.

10. When contractors with a city to erect a dam did extra work under burdensome conditions not within the contemplation of the parties when the contract was made, the deviations from the contract being so material as to entitle the contractors to recover on a *quantum meruit*, the recovery allowed should take the form of damages adequate to compensate for the additional burdens, which damages should be added to the contract price. (Hayden v. City of Astoria, 205.)

Municipal Corporations—Improvement Contract—Extra Work—Evidence.

11. In an action against a city by its contractors to build a dam to recover on a *quantum meruit* for extra work and delay caused by the city, where a ground alleged by the contractors for their right to recover was the increased burden of the work during the winter season, their testimony tending to show that the road into the works was a good road in summer, but that it would have been impassable in winter, but for the work they did on it, was competent. (Hayden v. City of Astoria, 205.)

Municipal Corporations—Extra Work—Evidence.

12. It was also competent for the contractors to prove that their labor was less efficient in the winter season, and that the burden of operating the rock quarry was greater in the winter. (Hayden v. City of Astoria, 205.)

Municipal Corporations—Improvements—Extra Work—Evidence.

13. The contractors were properly permitted to show that but for the deviations from the contract complained of they could have completed the work during the summer. (Hayden v. City of Astoria, 205.)

Municipal Corporations — Crossing Accidents — Questions for Jury—Evidence.

14. Evidence *held* to present a jury question whether driver of defendant's automobile truck was negligent in turning to the left before crossing an intersection, and in so doing killing the traffic officer stationed at such intersection. (White v. East Side Mill Co., 224.)

Municipal Corporations — Injuries to Persons — Instructions — Care Required.

15. In action for death of traffic policeman when struck by auto truck, instruction precluding recovery if the policeman was negligent, and that the jury could consider that he had duties to perform, and could not look after himself as an ordinary pedestrian, is not objectionable as imposing less than the ordinary degree of care upon the officer, where the court further instructed the jury to consider all the circumstances. (White v. East Side Mill Co., 224.)

Municipal Corporations—Special Assessments—Reassessments—Purchaser at Void Sale.

16. As a purchaser at a void sale for street assessment buys at his peril, and has no such equities as entitle him to be reimbursed by the property holder for the sum paid by him, a city may not reassess the property to obtain a fund from which to reimburse such purchaser. (Evans v. Meridian Investment & Trust Co., 246.)

Municipal Corporations—Benefit Assessments—Appeal to Circuit Court.

17. Portland City charter provides for reassessment against property whenever a benefit assessment has been set aside or declared void, or its enforcement refused by any court, directly or indirectly, or when the council shall be in doubt as to its validity. Section 400 relates to procedure. Section 401 provides that one who has filed objections to a reassessment or new assessment which have not been

satisfied, etc., may appeal to the Circuit Court of a named county, and that the jury shall view the property assessed, and its verdict shall be final and conclusive, etc. If the assessment is not paid within 30 days, the treasurer may collect delinquent assessments by sale in the manner provided by law for the sale of real property on execution, except as in the charter otherwise provided, and the purchase price is limited to the unpaid assessment and the interest and cost of advertising and sale. The sale conveys to the purchaser subject to redemption all the estate, interest, or claim of any person, together with all rights, etc. No levy is required except that a notice shall be posted four weeks upon every lot assessed to an unknown owner. Defendant purchased plaintiff's land at a sale by the city of Portland after an appeal by plaintiff to the Circuit Court on the amount of benefits to be assessed against his property, the result of which was that the original apportionment by ordinance making the assessment was affirmed: Sections 411 and 412. It is contended that the judgment of the Circuit Court must be enforced by execution; that a sale by the treasurer for liquidation of the demand was void and created no right or claim in the purchaser. *Held*, that authority for such sequestration of property must be found in the charter and pursued strictly, and that the only question to be determined by the Circuit Court is the amount of special benefits assessed to the property, and the assessment is to be enforced by sale of property by the treasurer; no execution being required. (West v. Scott-McClure Land Co., 296.)

Municipal Corporations—Assessments—Void Sale—Rights of Purchaser—Repayment of Sale Price.

18. City Charter of Portland, Section 419, requiring plaintiff in a suit to quiet title to land sold for delinquent assessments to deposit in court with his first pleading the purchase price at the previous sale with penalty and interest to be paid to the purchaser in case the right or title of such purchaser at such sale shall fail in such action, suit or proceeding, is unconstitutional and void, since it is in effect taking one man's property and giving it to another. (West v. Scott-McClure Land Co., 296.)

Municipal Corporations—Charter—Grant of Power.

19. A municipal charter is a grant and not a limitation of power, hence authority to enact an ordinance must be found in the charter expressly or by necessary implication. (Baggage & Omnibus Transf. Co. v. City of Portland, 343.)

Municipal Corporations — Enactment of Charter — Initiative and Referendum.

20. The Bay City city council having previously adopted an ordinance providing for exercise of the initiative and referendum powers reserved to the voters under the Constitution, and in pursuance thereof having in the absence of one of its members unanimously adopted an ordinance referring to the voters charter amendments and calling a special election for adoption or rejection, due notice of which was given by posting, publication, and distribution to each voter of a copy of the measure, the proposed new charter, on receiving a majority vote and being proclaimed duly ratified by mayor became the fundamental law of the city. (State ex. Inf. v. Bozorth, 371.)

Municipal Corporations—Injury to Gas-mains from Sewer Construction—Liability.

21. A gas company could not recover damages to its mains necessarily resulting from construction of a city sewer, since a municipality does not abdicate its paramount right in a street by giving a franchise therein to a public service corporation, and the gas company's franchise was subordinate to the city's control of the streets. (Portland Gas & Coke Co. v. Giebisch, 632.)

Municipal Corporations—Construction of Sewer—Duty to Use Care.

22. A municipality and its contractor are obliged to use reasonable care in construction of sewers and will be liable for damages occasioned by negligence in the performance of the work to property of a gas company consisting of its mains, pipes and appliances situate in the public streets. (Portland Gas & Coke Co. v. Giebisch, 632.)

Municipal Corporations—Injury to Gas-mains from Sewer Construction—Liability for Negligence.

23. Where it was possible to construct sewers without injuring gas-mains, the gas company could recover from a city contractor damages for the latter's negligence resulting in disturbance of mains, leakage of gas and fire. (Portland Gas & Coke Co. v. Giebisch, 632.)

Municipal Corporations—Injury to Gas-mains from Sewer Construction—Item of Recovery—Patrolling Streets.

24. A gas company could not recover from a city contractor a charge for patrolling the streets in which defendants were constructing a sewer, and by whose negligence gas-mains were injured, since, although defendants performed their work with care, plaintiff was chargeable with the duty of patrol and inspection. (Portland Gas & Coke Co. v. Giebisch, 632.)

Municipal Corporations — Public Improvements — Notice for Bids—Defective Publication.

25. Failure to publish a notice for bids for a street improvement for the time and in the manner required by Salem City Charter, Section 26, invalidates an attempted special assessment for the improvements, since the provisions for publication are mandatory. (Watson v. City of Salem, 666.)

Municipal Corporations — Public Improvements — Notice for Bids—Publication—"For"—"Not Less Than."

26. Salem City Charter, Section 26, requiring notice for bids for a street improvement to be published for not less than five successive days in a daily newspaper, requires the notice to be published for five full days before the right to submit bids is closed, since the word "for" means through, throughout, during the continuance of; and the words "not less than" signify in the smallest or lowest degree, at the lowest estimate. (Watson v. City of Salem, 666.)

Municipal Corporations — Public Improvements — Notice for Bids—Computation of Period.

27. Under Section 531, L. O. L., providing that the time for publication of legal notices shall be computed so as to exclude the first day of publication, and to include the day on which the act or event of which notice is given is to happen or which completes the full period

required for publication, and Salem City Charter, Section 26, requiring notice for bids for street improvement to be published for not less than five successive days in a daily newspaper, a notice that bids would be opened on June 10th, which was first published on June 5th, and published daily thereafter, to and including June 9th, was insufficient, since the whole of June 10th should have been given in which to file bids before they were opened. (Watson v. City of Salem, 666.)

Municipal Corporations—Public Improvements—Notice for Bids—Defective Publication—Effect.

28. The fact that no bids would have been received from other bidders if the full time had been allowed after publication of notice for bids does not validate a special assessment made for street improvements, since the proceeding is *in invitum*, in favor of which no equities will be declared. (Watson v. City of Salem, 666.)

See Estoppel, 2.

NAVIGABLE WATERS.

Navigable Waters—Title of State to Land Under Navigable Water—Admission of Territory.

1. On its admission to the Union, Oregon was vested with title to the land under the navigable waters within the state, subject to the public right of navigation, and to the common right of citizens of the state to fish. (Monroe v. Withycombe, 328.)

NEGLIGENCE.

Negligence—Violation of Statute—Evidence.

1. The violation of a statute designed for protection of others constitutes conclusive evidence of negligence or negligence *per se*. (Cauldwell v. Bingham & Shelley Co., 257.)

Negligence—Guest in Automobile—Due Care.

2. While negligence of the driver of an automobile cannot be imputed to a guest therein, the guest must exercise such care for his own safety as a reasonably prudent person would under like circumstances. (White v. Portland Gas & Coke Co., 643.)

Negligence—Contributory Negligence—Guest in Automobile—Question for Jury.

3. Whether the guest in an automobile has exercised reasonable care for his own safety is usually a question for the jury. (White v. Portland Gas & Coke Co., 643.)

See Gas, 1.
See Master and Servant, 2.
See Municipal Corporations, 21–24.

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See Appeal and Error, 1.

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As to Plans and Specifications for Street Improvement.
See Municipal Corporations, 3–5, 25–28.

NUNC PRO TUNC.
See Appeal and Error, 18.
See Courts, 2.
See Motions, 1.

OFFICERS.
Officers—Employment of Teacher—"Office."
1. A teacher permanently employed under Laws 1913, page 70, Section 4, does not hold an office, since the statute refers to it as an employment, and Article XV, Section 2, of the Constitution, prohibits the legislature from creating any office the tenure of which shall be longer than four years. (Alexander v. School Dist. No. 1, 172.)

Compelling Election Officials to Act.
See Mandamus, 4.

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PARTIES.
Parties—Pleading—Plea in Abatement.
1. Where a complaint in an action for deceit practiced on plaintiff in exchange of personal property for real estate stated a cause of

action, and did not state that the contract was made by or through an agent, or alleged representations were made to an agent of plaintiff, the defense in such exchange dealt with another person who purported to act as principal, and that plaintiff had no capacity to sue as undisclosed principal, was not in the nature of a plea in abatement. (Crowder v. Yovovich, 41.)

PAYMENT.

See Costs, 2, 3.

PENDENTE LITE.

See Appeal and Error, 28.

PERSONAL INJURIES.

See Corporations, 1.
See Death, 1.
See Evidence, 7–10.
See Gas, 2, 3.
See Limitation of Actions, 1–6.
See Master and Servant, 1–8.
See Municipal Corporations, 14, 15.
See Negligence, 2, 3.
See Pleading, 2, 3.

PLAT.

See Dedication, 1, 2, 4.

PLEADING.

Pleading—Loss of Goods by Carrier—Trial—Election Between Defenses.

1. In action against a carrier by water for loss of goods, refusal to require defendant's election between defenses that damage was caused by negligence of colliding dredge and by dangers of navigation, etc., is not erroneous, where motion was made after jury had been impaneled. (Rosenwald v. Oregon City Transp. Co., 15.)

Pleading—Allegation of Defendant's Residence—Aider by Complaint.

2. Defendant's answer in action for servant's injury while employed on defendant's steamship, alleging that the steamship referred to "is owned in California," and that defendant "is a California corporation," sufficiently alleged nonresidence at time cause of action arose when aided by allegations of complaint that defendant was a California corporation. (Hamilton v. North Pac. S. S. Co., 71.)

Pleading—Reply—Admission of Defendant's Nonresidence.

3. Plaintiff's reply to defendant's allegation that it was a California corporation, in admitting "that the owner of said steamship resides in the state of California," did not admit nonresidence, but merely admitted the conclusion which the law would draw from the fact that defendant was a foreign corporation. (Hamilton v. North Pac. S. S. Co., 71.)

Pleading—Bill of Particulars—Limitation of Proof.

4. When a bill of particulars is furnished as required by statute or by the order of a court of competent jurisdiction, the party furnishing it is confined in his proof to the items alleged therein, though

he may offer proof of the value of the items along other lines than those alleged in the bill. (Hayden v. City of Astoria, 205.)

Pleading—Bill of Particulars—Statute.

5. Under Oregon law, a bill of particulars is demandable only under the provisions of Section 84, L. O. L., and, unless the complaint alleges an account, a bill of particulars is not demandable under the section. (Hayden v. City of Astoria, 205.)

Pleading—Bill of Particulars—Limitation of Testimony—Statute.

6. In an action against a city by its contractors to erect a dam to recover the reasonable cost of extra work, where the contractors furnished an account on demand of the city, the action not being on an account, so that a bill of particulars was not demandable under Section 84, L. O. L., the account furnished could not be used to shut out testimony otherwise competent in the absence of showing that the city had been misled. (Hayden v. City of Astoria, 205.)

Pleading—Reply—Departure.

7. A plaintiff cannot allege that he has fully complied with a contract, and later shift his ground by replying that the omissions charged in defendant's answer were waived. (Waller v. City of New York Ins. Co., 284.)

Pleading—Demurrer—Admission.

8. For purposes of an appeal, demurrers to the complaint admit the facts pleaded. (Monroe v. Withycombe, 328.)

Pleading—Change of Case—Amendment.

9. Where original answer set up defense of violation of bulk sales law (Sections 6069–6072, L. O. L.), the court had no power under Section 102, L. O. L., to allow defendant to file an amended answer after trial, alleging actual fraud in the transfer; that being a material alteration not allowable at such time. (Golden Rod Milling Co. v. Connell, 551.)

Pleading—"Aider by Verdict."

10. The absence from a written statement of facts constituting a cause of action or defense of a material averment will not be supplied by a verdict, but such finding will cure a defective statement in a pleading, the principle of the rule being that, where pleading is sufficiently general to comprehend matter so essential to be proved that, had it not been given in evidence, the jury could not have found the verdict, the want of the statement of such matter in express terms will be cured by the verdict, because evidence of the fact would be the same whether the allegation is complete or imperfect; but, where a material allegation is wholly omitted, it cannot be presumed that any evidence referring to it was offered on the trial. (Lindstrom v. National Life Ins. Co., 588.)

Pleading—Aider by Verdict—Action on Life Policy.

11. In action on a life policy, where reply stated that medical examiner's misstatements in application were made without "collusion" instead of that they were made without insured's knowledge, a verdict for plaintiff cured the imperfection, since, if the matter had been called to the attention of the trial court, an amendment would probably have been allowed. (Lindstrom v. National Life Ins. Co., 588.)

See Appeal and Error, 10.
See Damages, 1, 2.
See Equity, 3, 4.
See Insurance, 3–5, 7, 9.
See Intoxicating Liquors, 2.
See Judgment, 5.
See Money Lent, 1.
See Mortgages, 4.
See Parties, 1.
See Reformation of Instruments, 1.
See Replevin, 1.
See Writ of Review, 1.

Insufficient Allegations in Disbarment Proceedings.
See Attorney and Client, 1.

Sufficiency of Averments to Support Decree.
See Equity, 2.

Allegations of Fraud in General.
See Fraud, 7.

PLEDGES.

Pledges—Repledges—Effect on Character of Chattels.

1. Plaintiff, defendant and defendant's wife were engaged in a farming venture. Upon a yearly settlement, plaintiff was short $1,282.73 which defendant arranged to advance to him. A holding corporation for the farm was formed, one third of the stock represented by one certificate being issued to each. Plaintiff claimed he turned his share to defendant as collateral to be used in raising money to pay his balance of the indebtedness. Under such circumstances, an instruction to the effect that a pledge is a transfer of personal property, as a security for a debt or other obligation, which the pledgee has a right to repledge, without the pledgor's consent, but that such new transaction would not change the character of the chattels as being hypothecated for debt, was proper, as between the original parties. (Morgan v. Johns, 557.)

Pledges—"Once a Pledge Always a Pledge"—Extinguishment.

2. The principle of once a pledge always a pledge applies to chattels hypothecated for a debt until their status has been changed by foreclosure of the lien of pledge or further contract of the parties. (Morgan v. Johns, 557.)

Pledges—Care of Property—Reimbursement.

3. Mortgagees assigned the mortgage and secured notes to a bank as collateral security for a debt. The mortgagors were unable to pay and conveyed the land to the bank, taking an option to repurchase, which they did not exercise. The bank canceled the notes and mortgage and surrendered them. An option to repurchase was subsequently given the mortgagees, who failed to exercise it, and the bank foreclosed, treating the conveyance to it as a mortgage. The bank had taken possession of the land and received the rents, issues, and profits, and the mortgagees sued to recover rents and profits received subsequent to the decree in the foreclosure suit. *Held*, that the bank was entitled to an allowance of sums paid by it

in caring for and superintending the management of the farm under the general rule that a trustee, though not entitled to compensation for services performed personally in discharging the trust, may recover the reasonable value of services of others employed by him. (Seaweard v. First Nat. Bank, 678.)

See Trover and Conversion, 3, 4.

POLICE POWER.

See Carriers, 7.
See Fish, 2.

PORTLAND, CHARTER OF.

See Baggage & Omnibus Transf. Co. v. City of Portland, 343.
See West v. Scott-McClure Land Co., 296.

POSSESSION.

See Bailment, 1, 2.
See Trover and Conversion, 2.

PREFERENCES.

See Counties, 4.

PRESUMPTIONS.

See Appeal and Error, 34.
See Appearance, 1.
See Constitutional Law, 12.
See Counties, 3.
See Discovery, 1.
See Husband and Wife, 1.
See Taxation, 7.

PRINCIPAL AND AGENT.

Principal and Agent—Existence of Agency—Jury Question.

1. Evidence *held* to warrant submission to the jury of the question whether defendant boom corporation which dug the ditch was the agent of the defendant lumber corporation in doing so. (Holden v. A. F. Coats Lum. Co., 605.)

See Estoppel, 1.
See Evidence, 1.
See Fraud, 2.

PRIVILEGES.

See Constitutional Law, 1.

PROCESS.

Waiver of Objections to Service.

See Appearance, 4.

On Foreign Corporation Doing Business Within State.

See Corporations, 1.

PUBLICATION.

Effect of Defective Publication.

See Municipal Corporations, 25–28.

PUBLIC IMPROVEMENTS.

See Municipal Corporations, 25–28.

PUBLIC POLICY.

See Constitutional Law, 10.

QUANTUM MERUIT.

See Account, Action on, 2.
See Evidence, 5.
See Municipal Corporations, 7–11.

QUESTION FOR JURY.

See Fraud, 1.
See Master and Servant, 3.
See Municipal Corporations, 14.
See Negligence, 3.
See Principal and Agent, 1.
See Sales, 6.
See Shipping, 3.

QUO WARRANTO.

See Mandamus, 1.

RAILROADS.

Railroads—Sale—Assignment of Contract.

1. Where a railroad company which had made a contract with a lumber company to construct an extension of a spur to a certain point to enable the lumber company to transport its logs, before the time for the completion of such extension, sold and conveyed to another railroad company its railroad with all other property real and personal, contracts, rights, etc., and the purchaser accepted the conveyance and commenced the construction of the extension, that conveyance, when construed in the light of the situation of the parties which prevented the vendor from performing the contract and conferred the benefits thereof on the purchaser, assigned the contract for the extension to the purchaser, and imposed on it the obligation to perform it. (Corvallis & Alsea Riv. R. Co. v. Portland E. & E. Ry. Co., 524.)

Railroads—Sale—Liability of Purchaser—Assigned Contract.

2. Where a railroad company assigned to a purchaser of its road a contract for the construction of a spur for a lumber company, which the purchaser was bound to perform, the assignor can recover from the purchaser the damages it has sustained by the latter's failure to perform the contract. (Corvallis & Alsea Riv. R. Co. v. Portland E. & E. Ry. Co., 524.)

REASSESSMENTS.

See Municipal Corporations, 16.

RECORD.

See Appeal and Error, 15, 19, 37.
See Courts, 4.

Necessity for Assignments of Error in Abstract of Record.

See Appeal and Error, 33.

Time in Which to File Printed Abstract of Record.
See Appeal and Error, 24.

Filing Supplemental Record After Decision.
See Appeal and Error, 32.

Contradiction of Record.
See Writ of Review, 3.

REFORMATION OF INSTRUMENTS.

Reformation of Instruments—Complaint.

1. In action to reform an instrument, the complaint must distinctly allege what the original agreement of the parties was, and clearly and precisely point out wherein there was a misunderstanding, that the mistake was mutual and did not arise from the gross negligence of the plaintiff, or that his misconception originated in the fraud of the defendant. (Boardman v. Insurance Co. of Pa., 60.)

Reformation of Instruments—Mutuality of Mistake.

2. That an instrument does not express the intent of one of the parties, but does conform to that of the other, does not warrant its reformation, since a contrary rule would destroy the principle of mutuality of contract. (Boardman v. Insurance Co. of Pa., 60.)

Reformation of Instruments—Evidence—Sufficiency.

3. In an action for reformation of an instrument, the testimony as to the real contract intended between parties must be clear and convincing, and, if it is at an equal balance either as to what the agreement was or as to the mutuality of the mistake, reformation will not be allowed. (Boardman v. Insurance Co. of Pa., 60.)

Reformation of Instruments — Evidence — Sufficiency — Insurance Policy.

4. In suit to reform and recover upon an insurance policy, evidence *held* not sufficient to show mistake by the insurance company in writing the policy. (Boardman v. Insurance Co. of Pa., 60.)

Reformation of Instruments—Grounds—Waiver of Policy Conditions.

5. In suit to reform an insurance policy, waiver of the conditions of the policy as to change of ownership by failure of the company to inquire about the ownership was not available; such ground of recovery being available only in an action at law on the policy. (Boardman v. Insurance Co. of Pa., 60.)

See Fraud, 6.

RENT.

See Landlord and Tenant, 1–4.

REPEAL BY IMPLICATION.

See Statutes, 6.

REPLEVIN.

Replevin—Complaint—Sufficiency.

1. A complaint in replevin seeking to recover possession of a dwelling-house on the land of the defendant, which recites no facts

to overcome the presumption that the building was real estate, was insufficient, and a demurrer thereto should have been sustained. (Enterprise Mercantile & Milling Co. v. Cunningham, 319.)

See Chattel Mortgages, 1.
See Fixtures, 1.

RESCISSION.

See Equity, 1.
See Vendor and Purchaser, 1, 6–8, 10, 11.

RES JUDICATA.

See Judgment, 1, 7.

RESULTING TRUST.

See Trusts, 2.

REVIEW.

See Appeal and Error, 6, 7, 9, 12, 13, 22, 26, 29–31, 39, 40.

SALEM, CHARTER OF.

See Albert v. City of Salem, 677.
See Carson v. City of Salem, 193.
See Fry v. City of Salem, 134.
See Lord v. City of Salem, 192.
See Watson v. City of Salem, 666.

SALES.

Sales—Validity—Misrepresentations.

1. Where a motor truck was purchased February 3d and suit was brought March 20th for rescission of the contract of purchase, and in the few weeks intervening between these dates the buyers twice returned the truck to the seller on the seller's promises to repair the truck and make it good, and the buyers complained continually that the car was unsatisfactory, and when finally apprised of the history of the truck promptly disaffirmed and brought suit, they were not barred of their remedy under the rule that where a person has been induced through fraud to execute a contract in order to avail himself of this defense, he should act promptly upon the discovery of the deception. (Hetrick v. Gerlinger Motor Car Co., 133.)

Sales—Implied Warranties—Articles of Food.

2. The doctrine of *caveat emptor* applies to a sale of potatoes by a wholesaler to a retail dealer in the absence of deceit or misrepresentation, so that, where the external appearance of the potatoes indicated soundness and good quality, it was no defense to an action for the price that they were affected with dry rot and had been condemned. (Swank v. Battaglia, 159.)

Sales—Construction of Contract—Sale or Option.

3. Agreement relating to raising of hops by defendant and purchase thereof by plaintiff, held to be a mutual agreement, and not a mere option in plaintiff's favor, and binding plaintiffs to accept the crop if of specified quality, although the quantity was less than that named in the contract. (Wigan v. La Follett, 488.)

Sales—Construction of Contract as a Whole.

4. In construing contract of sale, the whole agreement is to be considered, and not merely one clause of it, in the light of prevailing conditions and circumstances within parties' contemplation at the time of execution. (Wigan v. La Follett, 488.)

Sales—Question for Jury—Conflicting Evidence.

5. Where evidence was conflicting as to quality and inspection of hops which plaintiff had contracted to purchase, such questions were for the jury. (Wigan v. La Follett, 488.)

Sales—Delivery—Necessity of Notice by Seller.

6. Contract provision requiring seller to give ten days' notice of proposal to deliver was rendered ineffectual by the buyer's going to place of delivery and inspecting and refusing the crop. (Wigan v. La Follett, 488.)

Sales—Delivery—Necessity of Tender by Seller.

7. Where buyer upon inspection rejected goods, it was unnecessary for a seller to tender goods and load same as specified by contract, since this was to be done after acceptance as the buyer might direct. (Wigan v. La Follett, 488.)

Sales—Action on Contract—Instructions—Inspection.

8. Instructions submitting disputed fact as to whether buyer of hops had reasonable opportunity for inspection *held* proper. (Wigan v. La Follett, 488.)

Sales—Extent of Buyer's Inspection.

9. If buyer rejected hops after partial inspection, seller was not obliged to offer further opportunity for inspection. (Wigan v. La Follett, 488.)

Sales—Buyer's Refusal to Accept—Seller's Choice of Remedies.

10. Upon buyer's refusal to accept goods, the seller may keep the property subject to buyer's order after making tender thereof and sue for balance of purchase price, or may sell goods for best price obtainable and recover difference between amount obtained and contract price. (Wigan v. La Follett, 488.)

See Railroads, 1, 2.
See Trover and Conversion, 3.

With Reference to Recorded Plat.

See Dedication, 1, 4.

Sale of Diseased Food.

See Food, 1.

SCHOOLS AND SCHOOL DISTRICTS.

Schools and School Districts—District Expenses—Statutory Construction.

1. Under General Laws 1915, page 331, Section 4, providing that cost of educating a high school pupil be fixed by dividing the cost of maintaining the schools by the average daily attendance, etc., interest items paid on debt incurred for construction of the school cannot

be included in the maintenance charges. (School Dist. No. 24 v. Smith, 50.)

Schools and School Districts—Contract With Teacher—Transfer—Authority of Board—Statute.

2. Laws of 1913, page 69, Section 1, empowers the board of directors of every school district to hire and discharge teachers and to fix their compensation. Section 2 provides that the word "teacher" shall include supervisors and principals and instructors who are in the employ of the school district. Section 4 provides that teachers who have been regularly employed for not less than two successive annual terms shall be placed on the list of permanently employed teachers. Section 5 provides that permanently employed teachers shall not be subject to annual appointment, but shall continue to serve until dismissed in the manner therein provided, and that they shall serve in such positions and be subject to such assignments and transfer as the board may from time to time determine. Section 6 provides that before any permanently employed teacher can be dismissed notice must be given containing the charges against the teacher and a hearing had thereon if the teacher so requests. *Held*, that the transfer of a teacher who had been acting as principal to another school where she was an instructor merely was not a dismissal of the teacher, and was within the discretion of the board without a necessity for notice and hearing on charges. (Alexander v. School Dist. No. 1, 172.)

SETOFF AND COUNTERCLAIM.

Setoff and Counterclaim—Subject Matter—Claims Arising on Contract.

1. Under Section 74, L. O. L., providing that a counterclaim authorized by Section 73 must be one existing in favor of a defendant and against a plaintiff between whom a several judgment might be had in an action arising on contract or any other cause of action arising also on contract, and existing at the commencement of the action, where a landlord took promissory notes from his tenant secured by the terms of the lease by a first lien on the crops and placed such notes with a bank for collection, and the bank with notice of such lien subsequently took a chattel mortgage on the crops, and when the crops were sold took the money and applied it to the payment of its mortgage instead of crediting it on the notes, in a suit by the bank against the landlord upon a note, the landlord was entitled to assert his claim to the proceeds by way of counterclaim upon an implied contract as for money had and received by the third person to the landlord's use. (La Grande Nat. Bank v. Oliver, 582.)

SEWER.

Duty to Use Care in Construction of Sewer.

See Gas, 1.
See Municipal Corporations, 21–24.

SHIPPING.

Shipping—Liability of Carrier—Limitation—Dangers of Navigation and Unavoidable Accident.

1. A carrier by water may, by contract, exempt itself from liability for loss occurring from "dangers of navigation" or "unavoidable accident." (Rosenwald v. Oregon City Transp. Co., 15.)

Shipping—Liability of Carrier—Limitation—Construction—"Act of God."

2. Provisions in a carrier's contract, exempting it from loss to goods due to "dangers of navigation" and "unavoidable accident," are broader than term "act of God," and excuse it where a collision occurred without its fault. (Rosenwald v. Oregon City Transp. Co., 15.)

Shipping—Carriers—Loss of Goods—Jury Question.

3. Where a carrier's contract exempted it from loss due to "dangers of navigation" and "unavoidable accident," it is a jury question whether the loss so occurred without negligence on the carrier's part. (Rosenwald v. Oregon City Transp. Co., 15.)

Shipping—Carriers—Loss of Goods—Burden of Proof.

4. A defendant carrier by water whose contract exempted it from loss due to dangers of navigation or unavoidable accident has the burden of showing the loss so occurred without negligence on its part. (Rosenwald v. Oregon City Transp. Co., 15.)

Shipping—Carriers—Loss of Goods—Admissibility of Evidence.

5. Where defendant carrier claimed goods intrusted to it were lost by dangers of navigation or unavoidable accident, evidence regarding a recent change in the position of a dredge it collided with and an unexpected rise in the river, was admissible. (Rosenwald v. Oregon City Transp. Co., 15.)

Shipping—Carriers—Loss of Goods—Instructions.

6. In action against a carrier by water for loss of goods, requested instructions that defendant was not excused if loss was caused by certain water conditions were properly refused because not including defense based upon negligence of a colliding dredge. (Rosenwald v. Oregon City Transp. Co., 15.)

Shipping—Carriers—Loss of Goods—Instructions.

7. In action against a carrier by water for loss of goods, an instruction that defendant was not liable for loss caused by an unexpected rise in the river, etc., is erroneous, where there was no evidence to support such theory. (Rosenwald v. Oregon City Transp. Co., 15.)

Shipping—Carriers—Loss of Goods—Failure of Proof.

8. Where plaintiff declares upon the common-law liability of defendant common carrier, but the shipment was made under a written contract containing material restrictions upon its liability, there is a failure of proof preventing recovery. (Rosenwald v. Oregon City Transp. Co., 15.)

SPECIAL ASSESSMENT.

See Municipal Corporations, 16.

STATE INDUSTRIAL ACCIDENT COMMISSION.

See Master and Servant, 9–12.

Exempt from Giving Bond on Appeal by Commission.

See Appeal and Error, 35.

STATUTE OF FRAUDS.

Frauds, Statute of—Mining Claim.

1. Section 5132, L. O. L., making mining claims real estate, Section 5134, making mining claims conveyances, subject to provisions governing other realty, and Sections 804, 808, requiring conveyances, etc., of real estate to be in writing, prevent oral proof of an agreement to purchase a mining claim interest. (Hinderliter v. McDonald, 251.)

STATUTE OF LIMITATIONS.

See Limitation of Actions.

STATUTES.

Statutes—Construction—Adoption of Statute.

1. When a statute of another state is adopted and enacted, it must be deemed to have been passed subject to the interpretation given it by the courts of the state of its origin. (Maryland Casualty Co. v. Klaber's Estate, 115.)

Statutes—Passage—Signatures of Officers of Houses—Constitution.

2. Under Article IV, Section 25, of the Constitution, providing that a majority of all the members elected to each House shall be necessary to pass every bill or joint resolution, and that all bills or joint resolutions so passed shall be signed by the presiding officers of the respective Houses, every bill presented to the officers for their signatures shall in its entirety as presented have received the vote of a majority of the members of each House. (State of Oregon v. Boyer, 513.)

Statutes—Referendum by Legislature—Constitution.

3. By Article IV, Section 1, of the Constitution, the legislature can of itself refer to the people any and all laws enacted by it, provided that the act shall be first passed as other bills are enacted; less than a majority of the whole membership of the legislature having no authority to refer a bill. (State of Oregon v. Boyer, 513.)

Statutes—Passage as Amended—Constitution.

4. Under Article IV, Section 25, of the Constitution, providing that a majority of all members elected to each House shall be necessary to pass every bill or joint resolution, and that all bills or resolutions so passed shall be signed by the presiding officers of the respective Houses, where a bill consisting of four sections passed the House, and was sent to the Senate, and there amended by adding Section 5, providing that the act should be submitted to the people at the next general election, etc., and, as thus amended, was passed by the Senate and sent back to the House, and on the question, "Shall the House concur?" the yeas and nays were demanded, when twenty-eight voted yea, twenty-six voted nay, six were absent, and one was excused, the names of those voting and those absent or excused being entered in the journal, and the bill being signed by the Speaker of the House and the President of the Senate, the bill never passed the legislature, not having been approved in its amended shape (Laws 1917, p. 457), by a majority of the House. (State of Oregon v. Boyer, 513.)

Statutes—Construction—Enactment by Same Legislature.

5. Where statutes relating to the same subject have been favorably acted upon by the requisite majorities in each house of the same

legislative assembly, all the clauses of the several enactments should be construed together, so as to permit each to remain intact, unless some provision is so repugnant to succeeding sections that both cannot exist at the same time as substantive law, in which case the later one necessarily controls. (Benson v. Withycombe, 652.)

Statutes—Repeal by Implication.

6. Repeals by implication are not favored, but where two statutes are so repugnant that both cannot stand, the later necessarily operates as an implied repeal of the earlier. (Benson v. Withycombe, 652.)

See Adverse Possession, 1.
See Appearance, 2.
See Constitutional Law, 6, 12.
See Counties, 1, 4.
See Fish, 4, 5.
See Fraudulent Conveyances, 1.
See Highways, 1–3.
See Interest, 2–4.
See Intoxicating Liquors, 1.
See Limitation of Actions, 6–8.
See Pleading, 5, 6.
See Schools and School Districts, 1, 2.
See Time, 1.
See Trusts, 1.

Violation of Statute for Protection of Others, Effect.

See Negligence, 1.

STAY.

See Appeal and Error, 27.
See Costs, 2, 3.

STOCKHOLDERS.

Rights of in Showing Fraudulent Judgment Against Corporation.

See Corporations, 2.

STREET IMPROVEMENT.

See Municipal Corporations, 3–5, 16.

STREETS.

See Adverse Possession, 1.
See Dedication, 2–4.
See Municipal Corporations, 6.

Location of Street.

See Estoppel, 2.

STRICT FORECLOSURE.

Defective Title as a Defense.

See Vendor and Purchaser, 3–5, 8.

SUPERINTENDENT.

See Master and Servant, 7.

SUPREME COURT.

See Appeal and Error, 28.

TAXATION

Taxation—Tax Title—Burden of Proof.

1. Except as the statute relieves him of the burden, a party asserting a tax title must show a compliance with the statute in each step leading up to the execution of his deed. (Noble v. Watrous, 418.)

Taxation—Tax Title—Assessment.

2. Section 3127, B. & C. Comp., providing that a tax deed shall be *prima facie* evidence, shifts the burden of proof, but does not validate a tax title based on an insufficient assessment. (Noble v. Watrous, 418.)

Taxation—Tax Title—Assessments—Description of Land.

3. Under Section 2770, Hill's Ann. Laws 1892, requiring that the assessment-roll contain a description of each parcel of land to be taxed, a tax title based on two assessments respectively describing the land as "W.^{2} of N. E.^{4}" and "W.½ of N. E.^{4}" of a certain section, township and range was invalid. (Noble v. Watrous, 418.)

Taxation—Tax Title—Suit—Costs—Taxation.

4. Where in an action to quiet title it appears that the former owner abandoned the land more than twenty years before suit, that plaintiff secured a deed from her for a nominal consideration immediately prior to suit, that defendant purchased a tax title believing it unquestioned and paid the full value of the land, and for nearly twenty years paid taxes on the property, improving it, and exercising some dominion over it, though insufficient to satisfy the statute of limitations, and that the trial of the present suit was delayed nearly eight years, costs will be allowed to defendant in both courts on reversal of a decree for defendant and rendition of a decree for plaintiff. (Noble v. Watrous, 418.)

Taxation—Tax Title—Suit—Conditional Decree—Reimbursement for Taxes Paid.

5. Where it further appears in such case that defendant has paid taxes on the property during pendency of suit, the decree for plaintiff should be conditioned on his paying into court the money necessary to reimburse defendant for such taxes, with lawful interest thereon. (Noble v. Watrous, 418.)

Taxation—Assessment—Description of Property.

6. Section 2774, Hill's Ann. Laws 1892, providing that it should be sufficient to describe lands in all proceedings relative to assessing them for taxes by initial letters, abbreviations and figures to designate the township, range, section or part of a section, did not authorize the use of the exponents ^{2} and ^{4} to designate half and quarter sections, though thereunder the initial letters "N. E." would be accepted as the equivalent of northeast, "Sec." as section, and the figures ¼ as one-fourth. (Noble v. Watrous, 418.)

Taxation—Tax Deed—Presumptions and Burden of Proof.

7. Under Section 3127, B. & C. Comp., providing for the issuance of a deed to the purchaser at a tax sale, and that such deed shall be *prima facie* evidence of certain facts as to the assessment and sale, such presumptions of regularity attach only to a deed in favor of the purchaser, and do not attach in favor of a deed to an assignee of the certificate of sale. (Noble v. Watrous, 418.)

Taxation—Delinquent Tax-roll—Description of Property.

8. That a delinquent tax-roll did not show whether the range in which the property lay was east or west was a fatal defect. (Noble v. Watrous, 418.)

Taxation—Tax Sale—Time of Sale.

9. Under Section 2814, Hill's Ann. Laws 1892, requiring the warrant for the collection of delinquent taxes to be issued within ten days after the first Monday in April, and to be returnable on the first Monday in July, Section 2815, under which the warrant, when issued, had the force and effect of an execution, and Section 278, under which the life of an execution, unless prolonged in some way, was sixty days, where a warrant was not issued until July 27th, and the sale did not take place until November 29th, the warrant was *functus officio*, and the sale thereunder was void. (Noble v. Watrous, 418.)

TAX-ROLL.

Description of Property.

See Taxation, 3, 6, 8.

TAX TITLES.

Title and Rights of Purchaser Acquired at Tax Sale.

See Taxation, 1–5, 7, 9.

TEACHERS.

See Mandamus, 2.
See Officers, 1.
See Schools and School Districts, 2.

TENDER.

See Sales, 7.
See Trover and Conversion, 4.
See Vendor and Purchaser, 1, 5.

TIME.

Time—Perfecting Appeal—Statutory Provisions—Sunday.

1. Under Section 550, L. O. L., as amended by Laws of 1913, page 617, providing that from the expiration of the 5 days allowed to except to the sureties in the undertaking on appeal, the appeal shall be deemed perfected, an appeal became perfected with the expiration of Monday when the fifth day after the filing of the undertaking fell on Sunday. (Cauldwell v. Bingham & Shelley Co., 257.)

Time—Notice—Computation of Period.

2. Section 531, L. O. L., providing that the time for publication of legal notices shall be computed so as to exclude the first day of pub-

lication and to include the day on which the act or event of which notice is given is to happen, or which completes the full period required for publication, applies to the measurement of time for the publication of notices by cities or towns. (Watson v. City of Salem, 666.)

See Appeal and Error, 23.
See Courts, 1, 2.

TITLE.

See Vendor and Purchaser, 3–5, 8, 9.

Title or Possession to Support Suit to Restrain Trespass.
See Injunction, 1.

Title of State to Land Under Navigable Water.
See Navigable Waters, 1.

Failure to Furnish Abstract of Title.
See Vendor and Purchaser, 10.

TORTS.

Waiver of Tort.
See Action, 1.

TRANSCRIPT.

Failure to File.
See Appeal and Error, 15.

Extending Time in Which to File Transcript.
See Appeal and Error, 16–19.

Time in Which to File.
See Appeal and Error, 23.

TRANSCRIPTS.

See Courts, 1, 2.

TRESPASS.

See Injunction, 1.

TRIAL.

Trial—Instructions—Reliance on Representation.

1. In action for fraud in exchange of realty, an instruction upon right of plaintiffs making an investigation of the property to rely on defendants' representations, *held* to fairly submit the issues, when considered as an entirety. (Reimers v. Brennan, 53.)

Trial—Instructions.

2. Instruction that the jury is supreme in the realm of fact, and that the court is supreme in the realm of law, whether it correctly states it or not, is proper. (White v. East Side Mill Co., 224.)

Trial—Instructions—Repetition.

3. Refusal of requested instructions which, in so far as they conform to the law, were covered by charges given, was not error. (White v. East Side Mill Co., 224.)

Trial—Instruction—"Construction" of Contract.

4. Instruction that jury should give terms of contract for purchase of hops "such a reasonable construction" as placed upon them by persons engaged in that business, *held* not erroneous, the word "construction" referring to the evidence of the different witnesses, and not leaving to the jury the construction of the contract regardless of evidence. (Wigan v. La Follett, 488.)

Trial—Instructions—Cure by Other Instructions.

5. An instruction that seller could recover difference between amount realized from sale of hops after buyer's refusal to accept and the contract price, *held* not erroneous as giving the seller the right to sell hops for small fraction of their value when construed with other instructions. (Wigan v. La Follett, 488.)

Trial—Taking Case from Jury—Admissions—Evidence.

6. Where, in an action for conversion, plaintiff alleged sale by defendant of corporate stock held as collateral for a debt due defendant, which transaction defendant pleaded was a sale of stock to a third person, with an option from the vendee to plaintiff to repurchase, on a certain date, at a stipulated price, there was evidence that defendant had stated he held the stock as collateral and that the stock had been pledged to him as collateral, a motion for a nonsuit was properly denied, regardless of other evidence submitted. (Morgan v. Johns, 557.)

Trial—Instructions—Measure of Damages.

7. In such an action, a requested instruction by defendant that, in case the jury find for the plaintiff, they could only find for nominal damages, was properly refused, as excluding from the consideration of the jury the actual reasonable value of the stock. (Morgan v. Johns, 557.)

Trial—Instructions—Evidence.

8. An instruction in such an action allowing recovery for plaintiff for the reasonable market value of the shares of stock at the time of conversion is erroneous where there is no evidence of market value. (Morgan v. Johns, 557.)

Trial—Instructions—Conversion—Elements of Damage.

9. An instruction in such an action, that if the jury finds for the plaintiff, damages should be given him for the reasonable value of the stock, and in ascertaining the reasonable value, the jury should consider the reasonable market value of the "assets" of the corporation, if any, in arriving at the reasonable value of the stock, the verdict to be for such amount as the stock was found to be reasonably worth, *held*, prejudicially erroneous as limiting the jury to a consideration of the assets alone and excluding a consideration of the evidence in the record of the indebtedness of the corporation; both being necessary considerations. (Morgan v. Johns, 557.)

Trial—Reception of Evidence—Discretion of Court.

10. The court did not abuse its discretion in permitting the plaintiffs to testify upon rebuttal in regard to the nature and extent of the damage done by the high water, where it appears that his evi-

dence goes to meet unexpected evidence offered by defendant. (Holden v. A. F. Coats Lum. Co., 605.)

See Shipping, 1.

TROVER AND CONVERSION.

Trover and Conversion—Conversion.

1. Refusal to surrender an article to the owner entitled to its possession is a conversion. (Gregory v. Oregon Fruit Juice Co., 199.)

Trover and Conversion—Right to Possession—Burden of Proof.

2. Plaintiff claiming conversion because of defendant, having a lien on the chattel entitling him to possession, having agreed to accept a chattel mortgage and permit removal of the article, and then having refused to accept a tendered note and mortgage, has the burden of showing that the terms of the mortgage were definitely agreed on, and tender of a note and mortgage in conformity. (Gregory v. Oregon Fruit Juice Co., 199.)

Trover and Conversion—Elements—Sale of Pledge—Instructions.

3. A charge in an action for conversion of corporate stock that if the stock was pledged to the defendant only to secure money with which to repay the defendant for moneys advanced, defendant would have no authority to sell the stock outright, and that if he did, it would constitute a conversion, calling for a verdict for the plaintiff for the reasonable value of the pledge, not exceeding the sum mentioned in the complaint, was proper, in view of the continuing character of the contract of pledge. (Morgan v. Johns, 557.)

Trover and Conversion—Elements—Tender—Discharge of Lien of Pledge—Instructions.

4. Where, in an action for conversion, plaintiff alleged sale by defendant of corporate stock held as collateral for a debt due defendant, which transaction defendant pleaded was a sale of stock to a third person, with an option from the vendee to plaintiff to repurchase on a certain date, at a stipulated price, the court instructed the jury that if the shares were pledged as a security and the plaintiff had tendered or offered to pay the debt, being at the time able, ready, and willing to make the payment, the lien of the defendant would be discharged, and his refusal to return the pledge would be a conversion thereof, on account of which the jury should find for the plaintiff for the reasonable value of the property, not exceeding the amount stated in the complaint, was proper, as such conduct, if found to exist, constitutes conversion, as it is the exercise of an unjustifiable control over plaintiff's property, in derogation of his title to the same. (Morgan v. Johns, 557.)

See Damages, 1.
See Trial, 9.

TRUSTS.

Trusts—Bond of Trustee—Relief from Liability—Showing of Misconduct—Statute.

1. Under Section 685, L. O. L., providing that a surety upon the bond of any executor or other fiduciary may apply by petition to the court wherein the bond is directed to be filed, etc., praying to be relieved from further liability as surety, etc., the surety on the bond

of trustees under a will was not entitled to be relieved of further liability upon its arbitrary demand to be relieved, without showing any fault, revelation or misconduct on the part of its principals. (Maryland Casualty Co. v. Klaber's Estate, 115.)

Trusts—Resulting Trusts—Conveyance Without Consideration.

2. Where property is conveyed without consideration, and the circumstances conclusively rebut the presumption of a gift, equity will charge the grantee with a resulting trust in favor of the grantor. (Toney v. Toney, 310.)

UNDERTAKING.

Necessity for Undertaking on Appeal.

See Appeal and Error, 35.

Relief from Liability on Undertaking of Trustee.

See Trusts, 1.

UNITED STATES STATUTES.

See Table in Front of this Volume.

UNSWORN STATEMENT.

See Witnesses, 4.

VENDOR AND PURCHASER.

Vendor and Purchaser—Rescission by Purchaser—Tender of Purchase Price.

1. Under an agreement providing for a deed after payment of purchase price, the purchaser cannot rescind for failure to deliver deed where he has not tendered or paid purchase price. (Ward v. James, 375.)

Vendor and Purchaser—Assignment by Purchaser—Status of Vendor.

2. An assignment, or arraignment for an assignment, of a contract for the purchase of land, does not change status of vendor; the assignee standing in no better position than assignor. (Ward v. James, 375.)

Vendor and Purchaser—Strict Foreclosure—Defense—Defective Title.

3. In an action against a purchaser in possession for strict foreclosure of a contract for the sale of land by vendor before the time when he is required to pass title, the purchaser cannot defend on the ground that title is defective, since vendor may acquire title before the specified time. (Ward v. James, 375.)

Vendor and Purchaser—Strict Foreclosure—Defective Title—Estoppel.

4. In such case the vendor and vendee stand in relation of landlord and tenant, and the purchaser, or his assignee, in possession is estopped from denying title of vendor. (Ward v. James, 375.)

Vendor and Purchaser—Strict Foreclosure—Tender of Title—Concurrent Acts.

5. The rule that before vendor can foreclose a sale contract he must tender title according to contract is not applicable, where pay-

ment of purchase price is a condition precedent to execution of deed; payment and making conveyance not being concurrent acts. (Ward v. James, 375.)

Vendor and Purchaser—Rescission by Purchaser—Default in Payment of Interest.

6. Under an agreement providing for a deed after payment of purchase price, the purchaser cannot rescind for defects in vendor's title, where, after allowing purchaser all credits to which he is entitled, he is still in default in payment of interest at the time vendor brings suit to foreclose the contract. (Ward v. James, 375.)

Vendor and Purchaser—Rescission by Vendor—Conditions Precedent.

7. In order to put the vendor in default and claim a rescission of the contract, the purchaser must be ready to pay the entire purchase price, must offer to do so and demand a deed. (Ward v. James, 375.)

Vendor and Purchaser—Rescission—Grounds—Defects in Title.

8. Under a contract providing for a deed after payment of purchase price, payable a long time subsequent to date of contract, a defect in vendor's title does not call for rescission, provided sale is in good faith, and vendor has not by some affirmative act put it out of his power to perform; it being sufficient that he have title when purchaser has a right to a deed. (Ward v. James, 375.)

Vendor and Purchaser—Strict Foreclosure— "Good Commercial Title" —Necessity.

9. Although contract did not require delivery of a good and sufficient deed free from all legal encumbrances until payment of purchase price, vendor must, where he seeks a strict foreclosure, require purchaser to pay within a limited time a large sum of money due on purchase price, or lose his interest in property, be able to furnish a good commercial title, a title such as attorney for purchaser should advise his client to accept. (Ward v. James, 375.)

Vendor and Purchaser—Rescission by Purchaser—Failure to Furnish Abstract—Estoppel.

10. Granting that contract should be reformed, so as to require vendor to furnish an abstract of title, purchaser, who purchased an abstract and made payment on purchase price after vendor's alleged failure, was not entitled to rescind for vendor's failure to furnish an abstract. (Ward v. James, 375.)

Vendor and Purchaser—Rescission—Sufficiency of Evidence.

11. Testimony of plaintiff purchaser and another that the vendor misrepresented a boundary line does not warrant a rescission, where the abstract, deeds and maps correctly describing the property were examined by the plaintiff's agents, especially where plaintiff seeks to rescind after the property has decreased in value. (Marmeni v. Bellarts, 610.)

VERDICT.

Aider by Verdict.

See Pleading, 10, 11.

WAIVER.

See Appearance, 4.
See Banks and Banking, 2.
See Insurance, 1, 3.
See Reformation of Instruments, 5.

Waiver of Tort.

See Action, 1.

Waiver of Writ in Review Proceedings.

See Justices of the Peace, 1, 2.

WARRANTIES.

See Exchange of Property, 2, 3.
See Sales, 2.

WARRANTS.

See Municipal Corporations, 1.

WATERS AND WATERCOURSES.

Waters and Watercourses—Irrigation—Contract for Water.

1. Under a contract to furnish certain amounts of water for irrigation, and allowing the land owner to designate when it should be delivered upon giving three days' written notice, failure to furnish the prescribed amount of water is not excused because no notice was given, since such notice is only necessary where the land owner desires to regulate the flow. (Smith v. Willis, 270.)

Waters and Watercourses—Irrigation—Agreement to Furnish Water—Effect.

2. Where an agreement to perpetually furnish water for irrigation was executed as a conveyance, the water right conveyed became appurtenant to and a part of the land. (Smith v. Willis, 270.)

Waters and Watercourses—Enjoining Dam—Sufficiency of Evidence.

3. Substantially uncontradicted evidence that defendant's dam backed water on to plaintiff's land, preventing cultivation of some land, and interfering with pumping pure water to his house, *held* to require an injunction against such an obstruction of the stream. (Dragseth v. Mason, 547.)

Waters and Watercourses—Flooding Land—Evidence—Admissibility.

4. In an action for damages caused by changing the channel of a river by digging a ditch across the open end of a horseshoe bend and flooding plaintiffs' land, evidence that the stockholders of both the defendant corporations were identical and that their subscriptions in each corporation were in exact proportion, and that the secretary of both corporations was identical, and that the manager of the defendant lumber corporation was a director of the defendant boom corporation, and was active in negotiations whereby it was sought to obtain plaintiffs' consent to the digging of the ditch, and that the foreman of the actual work of digging the ditch was an employee of the lumber corporation and received his pay from it, and that the boom corporation derived the funds with which to carry on its work from

the heaviest stockholder in the lumber corporation and from the lumber corporation, without other evidence of the debts than promissory notes and open account, and that the boom corporation had not handled any logs other than those belonging to the lumber corporation, was admissible as tending to prove the liability of the lumber corporation for acts of the boom corporation in digging the ditch. (Holden v. A. F. Coats Lum. Co., 605.)

Waters and Watercourses—Appropriation—Abandonment.

5. Under Section 5136, L. O. L., declaring that ditches and mining flumes permanently affixed to the soil are real estate, provided that, when the owner shall cease to operate or exercise ownership for a period of five years, or shall remove from the state with the intent to change residence, and shall remain absent one year without using or exercising ownership, he shall be deemed to have lost all interest therein which was, impliedly, amended in respect to the period of limitation by Section 6571, L. O. L., providing that the right to appropriate water may be lost by abandonment, and that by failure or neglect to use same for a period of two years such water shall revert to the public and be subject to other appropriation, but the question of abandonment shall be one of fact to be tried and determined as to the questions of fact, where there was no evidence to explain or excuse the delay of a mining corporation for more than two years to use its ditch or flume or water thereby conducted, the corporation had abandoned its appropriation, and its trustee in bankruptcy could convey no right to defendants, who in entering such property were trespassers upon the property of plaintiff, who was in actual possession after appropriation, and further trespasses by defendants will be enjoined. (Camp Carson Mining Co. v. Stephenson, 690.)

WITNESSES.

Witnesses—Cross-examination—Scope—Discretion of Court.

1. In action for damages for fraudulent representation in exchange of real estate, it was a proper exercise of the court's discretion to exclude cross-examination of a defendant to elicit the fact that the property received by him and his wife in exchange was sold two years after the exchange at an advance in value, since both the *bona fides* of that transaction and the value of the property received by defendants were collateral issues. (Reimers v. Brennan, 53.)

Witnesses—Impeaching One's Own Witness.

2. Under Section 861, L. O. L., as to impeaching one's own witness, a witness may be contradicted by a party calling him, where the witness gave testimony damaging to the party calling him on the ground of surprise, by showing that he has made at other times statements inconsistent with his present testimony, as provided in Section 864, as to impeaching witness by inconsistent statements, although the party producing the witness is not allowed to impeach his credit by evidence of bad character. (Reimers v. Brennan, 53.)

Witnesses—Impeachment—Prior Convictions.

3. In view of statutory provision that to impeach a witness it may be shown by examination of the witness that he has been convicted either of a felony or misdemeanor, in a prosecution for the illegal sale of intoxicating liquors, where defendant testified that he had been

convicted but once, the state was properly permitted to show in rebuttal that there were five prior convictions of defendant. (State v. Newlin, 323.)

Witnesses—Corroboration by Unsworn Statements.

4. A witness' former statement not under oath was not competent under Sections 861, 864, L. O. L., allowing a party to show former inconsistent statements of his witness, to strengthen his evidence given in court, which was weak, although not adverse or prejudicial, but merely unsatisfactory to defendant. (Wigan v. La Follett, 488.)

Qualification of Expert Witness.

See Evidence, 5, 6.

WORDS AND PHRASES.

"Act of God"—See Rosenwald v. Oregon City Transp. Co., 15.
"Alter by parol"—See Lindstrom v. National Life Ins. Co., 588.
"Automobile repairer"—See Courts v. Clark, 179.
"Collusion"—See Lindstrom v. National Life Ins. Co., 588.
"Construction"—See Wigan v. La Follett, 488.
"Conversion"—See Gregory v. Oregon Fruit Juice Co., 199.
"Dangers of navigation"—See Rosenwald v. Oregon City Transp. Co., 15.
"Exception"—See Morgan v. Johns, 557.
"Extraordinary services"—See Todd v. Cormier, 11.
"For"—See Watson v. City of Salem, 666.
"From day to day"—See White v. East Side Mill Co., 224.
"Good commercial title"—See Ward v. James, 375.
"Interested"—See Miller v. State Industrial Acc. Comm., 507.
"Involuntary indebtedness"—See State ex rel. v. Stannard, 450.
"Journal entry"—See White v. East Side Mill Co., 224.
"Nonresident"—See Hamilton v. North Pac. S. S. Co., 71.
"Not less than"—See Watson v. City of Salem, 666.
"Office"—See Alexander v. School Dist. No. 1, 172.
"Once a pledge always a pledge"—See Morgan v. Johns, 557.
"Opening"—See Cauldwell v. Bingham & Shelley Co., 257.
"Out of the state"—See Hamilton v. North Pac. S. S. Co., 71.
"Public utility"—See Baggage & Omnibus Transf. Co. v. City of Portland, 343.
"Real Party in interest"—See State Land Board v. Lee, 431.
"Resident"—See Hamilton v. North Pac. S. S. Co., 71.
"Unavoidable accident"—See Rosenwald v. Oregon City Transp. Co., 15.

WORKMEN'S COMPENSATION ACT.

See Master and Servant, 9–12.

WRIT OF REVIEW.

Writ of Review—Certiorari—Pleading.

5. In proceeding for writ of review, defendant's only pleading is a return to the writ. (Roethler v. Cummings, 442.)

Writ of Review—Certiorari—Questions Presented.

7. A writ of review presents questions of law alone arising on the record of the inferior tribunal. (Roethler v. Cummings, 442.)

Writ of Review—Certiorari—Contradiction of Record.

8. The record of the inferior tribunal brought up on writ of review cannot be contradicted on re-examination by the reviewing court, although incorrect. (Roethler v. Cummings, 442.)

See Justices of the Peace, 1, 2.